TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION,
PETITIONER,

vs.

UNITED STATES OF AMERICA, AS OWNER OF THE U.S.N.S. HAITI VICTORY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 11, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

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[fol. 1a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 7622

PETITION OF THE UNITED STATES OF AMERICA, AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY IN A CAUSE OF LIMITATION OF LIABILITY, CIVIL AND MARITIME—Filed June 18, 1953

First. The United States of America is a sovereign and was at all times hereinafter mentioned the owner and operator, as a public vessel of the United States, of the USNS HAITI VICTORY, with an office and place of business in this district at U. S. Naval Operating Base, Norfolk, Virginia. By statute, the United States is entitled to the benefits of all exemptions and of all limitation of liability accorded to the owners, charterers, operators or agents of vessels, 46 U. S. C. 789.

Second. The USNS HAITI VICTORY was and is a single screw steel steamship 439.1 feet in length, 62.1 feet in breadth, and 34.5 feet in depth, Victory type, official number 246 243, of 7,607 gross tons, computed as provided by 46 U. S. C. 183 (c). Until the happening of the events referred to hereinafter, the USNS HAITI VICTORY was tight, staunch, strong, and seaworthy, and was in all respects fitted for the voyage on which she was engaged.

Third. The said USNS HAITI VICTORY is at present lying within this district and within the jurisdiction of this honorable Court, being berthed at Berth 35, pier 3, U. S. Naval Base, Norfolk, Virginia.

[fol. 1-b] Fourth. The USNS HAITI VICTORY departed from New York City on or about the 27th day of April, 1953, carrying Government cargo for the armed forces and their bases overseas, bound first for Argentia, Newfoundland, and thence to Bremerhaven, Germany.

Fifth. Having completed the leg of her voyage from New York to Argentia, the HAITI VICTORY arrived off Dover breakwater, bound for Bremerhaven, Germany, from Argentia, at about 1:00, a. m., on May 6, 1953, and there picked

up a North Sea Pilot. The North Sea Pilot was duly licensed by Trinity House, held a British master's license, and was skilled and acquainted with piloting in the North Sea. The HAITI VICTORY proceeded up the Channel past the Goodwins on the usual courses, and during the early morning of May 6, 1953, was on course 023½° T. approaching Galloper Lightship. An experienced and vigilant lookout was at the bow; a skilled quartermaster at the wheel; the chief officer on watch on the bridge; and the North Sea Pilot at the conn.' The usual complement of skilled engineers was on duty in the engine room. She was in all respects seaworthy, and properly manned, equipped, and supplied. The HAITI VICTORY passed abeam of Galloper Lightship at 0414, distance 1.3 miles off, and altered course to 035° T. to make for ST 3 Buoy. At the time the HAITI VICTORY passed Galloper Lightship and for the nighttime previous thereto, visibility was good; the sea was calm; the air was light; and visibility appeared to be unimpaired. It was still dark but to the eastward there were signs of daybreak. The lightship was not sounding any fog signals, nor were any fog signals being sounded by any of the other vessels whose lights could be plainly seen in the vicinity. The HAITI VICTORY had passed another vessel shortly before arriving at Galloper Lightship and the lights of this vessel had been clearly visible for some time. Less than a minute after the HAITI VICTORY had passed Galloper Lightship abeam, a short one-blast whistle was heard forward of the beam. The radar of the HAITI VICTORY was not in use but had been kept in a warmed-up [fol. 2] standby condition as a matter of prudence. No light or vessel could then be identified with the whistle which had been heard. There was no sign of any fog or of any fog bank. However, the radar which was immediately put to use showed a target about a mile off, bearing on the starboard bow. The HAITI VICTORY immediately stopped her engines and the pilot concentrated on the radar image. As soon as the radar showed that the target was moving toward the course of the HAITI VICTORY the pilot of the HAITI VICTORY ordered hard right rudder and one short blast of the whistle. These orders were promptly obeyed. The other vessel, which later proved to be the DUKE OF YORK, blew two short blasts indicating that she

was turning to port. The engines of the HAITI VICTORY were promptly put full speed astern and she sounded three short blasts. Despite the avoiding action attempted by the HAITI VICTORY, the DUKE OF YORK continued with no apparent reduction of speed and turned towards the HAITI VICTORY resulting in a hard collision, the force of which cut the bow of the DUKE OF YORK in two. The DUKE OF YORK proved to be a cross-Channel railway ferry operating on a fixed schedule between the Hook of Holland and Harwich, England, and had aboard 437 passengers who were being transported from a railroad station in Holland to a railroad station in Harwich. The DUKE OF YORK was a twin screw modern passenger ferry built in the United Kingdom in 1935 and capable of speed in excess of 21 knots and is believed to have been operating on radar on her voyage across the Channel traffic. The collision occurred at approximately 0416. Prompt efforts were made by both vessels and by a number of other vessels in the area to aid the injured, to rescue the passengers, and to take all possible humanitarian measures to bring the injured persons into various ports and places in the United Kingdom.

[fol. 3] Sixth. The aforesaid collision and all damages, losses and injuries resulting therefrom were not caused or contributed to by any fault or neglect on the part of the USNS HAITI VICTORY or those in charge of her but were caused by the fault and neglect of the SS DUKE OF YORK and the persons in charge of her in the following respects, among others which will be pointed out at the trial thereof:

1. She was being navigated at a rate of speed which was dangerous, excessive, and improper in view of the existing conditions.

2. She was proceeding through a mist or conditions of reduced visibility without the sounding of fog signals.

3. She sounded a one-blast starboard turning signal without changing course to starboard.

4. She crossed a one-blast starboard turning signal from the HAITI VICTORY with a two-blast port turning signal of her own.

5. She sounded a two-blast port turning signal and did not sufficiently change course to port.

6. She failed to maintain her course and speed in a crossing situation.

7. She failed to plot her radar data so as to pass either clearly ahead of the target, which proved to be the HAITI VICTORY, or sufficiently alter course to port so as to pass clearly astern of the target, which proved to be the HAITI VICTORY.

8. She failed to plot her radar data so as to allow for sufficient clearance of the target if the target altered course at Galloper Lightship.

9. She was not maintaining an efficient lookout.

10. She was not maintaining a lookout properly sta-
[fol. 4] tioned in the eyes of the ship.

11. She did not seasonably stop and reverse her engines.

Seventh. The aforesaid collision and all losses, damages, deaths, and injuries resulting therefrom were done, occasioned, and occurred without fault on the part of the petitioner and without the petitioner's privity or knowledge, and without the privity or knowledge of the master or of the superintendent or managing agent of the petitioner at or prior to the commencement of the voyage.

Eighth. The DUKE OF YORK was cut in two by the collision and her owners have filed claim for damages in excess of $1,500,000. Eight persons aboard the DUKE OF YORK were killed as a result of the collision. Their names and addresses, so far as presently known, are annexed hereto as Schedule A. Approximately nine persons aboard the DUKE OF YORK were injured as a result of the collision. Their names and addresses are annexed hereto as Schedule B. Notices have been given on behalf of several of the deceased and injured passengers that claims will be made. Inquiries looking toward the filing of claims have been made in other cases. In addition to the above, a great many passengers on board the DUKE OF YORK who were not injured have made claims for loss of their baggage or personal effects. The names and addresses of all these persons are not presently known to the petitioner. In addition, the cargo and mail aboard the DUKE OF YORK was damaged or

lost and its owners are expected to make claims against the United States.

Ninth. The USNS HAITI VICTORY, in good condition before the collision, was worth no more than $1,100,000. She was carrying Government cargo for the petitioner at that time and had no commercial freight on the voyage. The cost of repair to the HAITI VICTORY arising from the collision amounted to $64,500. The total value of the petitioner in the USNS HAITI VICTORY after the collision is not in excess of $1,035,000. The amount of the alleged claims [fol. 5] exceeds the amount of the value of petitioner's interest in the HAITI VICTORY together with her freight pending at the end of the same voyage. No written notice of claim was given to petitioner by anyone at any time more than six months prior to the filing of this petition.

Tenth. There are no liens on the USNS HAITI VICTORY.

Eleventh. Petitioner believes that claims for substantial amounts may hereafter be presented to it for damages sustained by the DUKE OF YORK, passengers aboard the DUKE OF YORK, the next of kin of deceased passengers, and representatives of cargo aboard the DUKE OF YORK. Although the particulars thereof are presently unknown, petitioner is informed and believes that the total claims of all who may have suffered loss, damage, or injury by reason of the aforesaid collision will exceed the value of petitioner's interest in the USNS HAITI VICTORY and her pending freight.

Twelfth. Petitioner desires to contest its liability and the liability of the USNS HAITI VICTORY for all losses, damages or injuries resulting from the aforesaid collision with the DUKE OF YORK. Petitioner further claims the benefit of limitation of liability as provided in Sections 4283, 4284, 4285, and 4286 of the Revised Statutes (46 U. S. C. 183-186) and of the various statutes supplementary thereto and amendatory thereof and to that end petitioner is ready and willing to proceed according to the law and pursuant to the rules of practice of the Supreme Court of this Honorable Court.

Thirteenth. Petitioner, as a sovereign, is not required to give security and is exempt from providing bonds or stipulations of value pursuant to the provisions of 28 U. S. C. 2408.

Fourteenth. All and singular, the premises are true and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 6] Wherefore, petitioner prays:

1. That the Court cause due appraisement to be made of the amount or value of petitioner's interest in the USNS HAITI VICTORY.

2. That the Court enter an order directing the issuance of a monition against all persons claiming or who may have claimed damages for any and all loss, damage, injury or destruction arising, occasioned, incurred by, or resulting from the aforesaid collision, citing them to file their claims with the clerk of the court and to serve on or mail to the proctors for the petitioner copies thereof on or before the date to be named in said writ and to make due proof of their respective claims; further to appear and answer the allegations of this petition according to the law and practice of this court at or before a time certain to be fixed by said monition.

3. That notice of the monition in the form prescribed by Supreme Court Admiralty Rule 51, as amended, shall be published in the newspaper specified by the rule of this Court for legal publication, and also in a newspaper of general circulatio in the United Kingdom, published at London, once each week for four successive weeks before the return date of the monition.

4. That the Court will issue its injunction restraining prosecution of any and all suits, actions and proceedings that may be already begun to recover damages arising out of, occasioned by, or consequent upon the aforesaid collision or arising during the voyage on which the USNS HAITI VICTORY was then engaged, and further restraining the commencement or prosecution hereafter of any suit, action, or legal proceeding of any nature or description whatsoever, except in the present proceeding, against the petitioner or its agents or representatives or against the USNS HAITI VICTORY in respect of any claim or claims arising out of the aforesaid voyage or aforesaid collision.

[fols. 7-8] 5. That the Court in this proceeding will adjudge that the petitioner is not liable to any extent for any loss, damage, injury, or for any claim whatsoever in any way arising out of or in consequence of the aforesaid

voyage or the aforesaid collision; or if the petitioner be adjudged liable then such liability be limited to the amount of the value of petitioner's interest in the USNS HAITI VICTORY and her pending freight as of the ending of her voyage at Bremerhaven and that the petitioner be discharged of all further liability upon the payment of this amount and that all moneys decreed to be paid be divided pro rata among such claimants as may duly prove their claims before this Court, saving to all parties any priorities to which they may be legally entitled; further, that a decree thereupon be entered discharging petitioner from all further liability.

6. That petitioner may have such other or further or different relief as the justice of the cause may require.

A. Carter Whitehead, United States Attorney,
United States Courthouse, Norfolk, Virginia.

Verification (omitted in printing).

[fol. 9] SCHEDULE A TO PETITION

Deaths

1. Mary Margaret Ansdell, "South Green", Warborough, Oxford, British Subject.

2. Gilda Ida Jordet, 1603 Pine Avenue, Rocky Ford, Colorado, U. S. A., Citizen of USA.

3. Berneice Viola Larson, 1613 Liberty Street, La Crosse, Wisconsin, U. S. A., Citizen of USA.

4. Kürt Wilhelm Friedrich Fromm, Oldenburg/O, Efferstrasse 2/8, Germany, Of German Nationality.

5. Rose Anne Spring, 88 Hansa Allee, Frankfurt-on-Main, Germany, Citizen of USA.

Missing

Dale M. Chaney, 2nd Lt., U. S. Air Force, Citizen of USA.

Ferdinand Vodicka, (Address not given on passenger list), German National.

Miss Laucheiner (Lwuchainer), (Address not given on passenger list), German National.

[fol. 10] SCHEDULE B TO PETITION

Personal Injuries

1. Mr. Jacobus Held, Merlen Street 78, The Hague, Holland.

2. Lt. Joseph Donald Baca, 3rd Air Postal Squadron, 1604 Central Avenue, S. E., Albuquerque, New Mexico, U. S. A.

3. Mr. Joseph Fassebender, Michaelstrasse 61, Neuss am Rhein, Germany.

4. Mr. Hendrick Jocken Hoogkamp, 6 Cattsstreet, Heilo, Holland.

5. Mr. Thomas David Moors, 37 Harbour Crescent, Harwich, England.

6. Dowager Countess Frances Pellew of Exmouth, of Poundgate Lodge, Crowborough, Sussex, England.

7. Gunter Hartmann, Wurpertal, Barmeu, Germany.

8. Arthur Goodman, The Netherlands, Bridge Road, Long Sutton, Spalding, Lincs.

9. Karl H. Nickolaus Bensemann, Schwachhauser-Heer Str. 212, Bremen, Germany.

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

ORDER DIRECTING ISSUANCE OF MONITION AND ENJOINING SUITS—June 18, 1953

A petition having been filed herein on June 18th, 1953, by the United States as owner of the USNS HAITI VICTORY, claiming the benefit of limitation of liability provided for in 46 U. S. C. 183-189 and 46 U. S. C. 789, and also contesting its liability independently of the limitation of liability, claimed under those statutes for any and all losses, damages, deaths or injuries occasioned by or resulting from the collision between the DUKE OF YORK and the USNS HAITI VICTORY on May 6, 1953, and the petition also stating

the facts and circumstances on which said exoneration and limitation are claimed; and it appearing that claims have been made or are about to be made against the petitioner for loss, damage, injury or destruction alleged to have been incurred in consequence of said collision; now, on motion of A. Carter Whitehead, United States Attorney, proctor for petitioner, it is

Ordered that a monition issue out of and under the seal of this Court against all persons claiming damages for any and all losses, damages, deaths and injuries occasioned by or resulting from the collision between the DUKE OF YORK and the USNS HAITI VICTORY on May 6, 1953, citing them and each of them to appear before this Court and file their respective claims in writing and under oath with the clerk of this Court at the United States Courthouse, Norfolk, Virginia, on or before the 15th day of October, 1953, at 10 o'clock in the forenoon of that day and to serve copies thereof on the proctor for the petitioner on or before the return date of the monition and to prove the same in accordance with the rules and practice of this Court on notice to all parties and with liberty also to any such claimants [fol. 12] who shall have presented their claims to said clerk of this Court under oath to answer said petition; and it is further

Ordered that notice of such monition in substantially the form provided by Rule 51 of the Rules of Practice in Admiralty and Maritime Cases shall be published in the Virginian Pilot newspaper once each week for four successive weeks before the return date of the monition and that it be also published in the London Times newspaper once each week for four successive weeks before the return date of the monition and it is further

Ordered that petitioner, not later than the day of the second publication of said notice in the Virginian Pilot shall mail a copy of the notice provided for by Rule 51 of the Rules of Practice in Admiralty and Maritime Cases to:

(1) Every claimant set forth in Schedule A annexed to said petition and to their proctors or attorneys, if known;

(2) Such other persons or corporations, if any, as

are known to have any claim against the USNS HAITI VICTORY or the petitioner; and

(3) The personal representative or next of kin, if known, of all persons known to have lost their lives in said disaster, together with a copy of Rule 52 of the Rules of Practice in Admiralty and Maritime Cases, as amended, and to the decedents at their last known addresses and also to any person who shall have been known to have made any claim or account of such death, together with a copy of Rule 52 of the Rules of Practice in Admiralty and Maritime Cases; and it is further

Ordered that except in the present proceeding, the beginning or prosecution of any and all suits, actions or proceedings of any nature or description whatsoever against the petitioner or USNS HAITI VICTORY or either of them, in respect of any claim arising out of the collision between [fol. 13] the DUKE OF YORK and the USNS HAITI VICTORY which occurred on May 6, 1953, be and they hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that service of this order as a restraining order be made within this district in the usual manner or in any other district by the United States marshal for such district by delivering a copy of this order to the person or persons to be restrained or to his or their respective proctors or attorneys; or by registered mail to persons who are outside the districts.

Albert V. Bryan, United States District Judge.

Alexandria, Va., Dated June 18, 1953.

[fol. 14] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

MONITION—Filed July 28, 1953

The President of the United States of America to the Marshal of the United States District Court for the Eastern District of Virginia, greeting:

Whereas, a petition was filed in the United States District Court for the Eastern District of Virginia at Norfolk on the 18th day of June, 1953, by the United States, as owner of the USNS HAITI VICTORY for exoneration from or limitation of liability concerning the loss, damage, loss of life, injury or destruction occasioned by or resulting from the collision between the DUKE OF YORK and the USNS HAITI VICTORY on May 6, 1953, or otherwise arising from the voyage on which the USNS HAITI VICTORY was then engaged for the reasons mentioned in said petition, and praying that a monition issue out of this Court citing all persons claiming damages by reason of the matters aforesaid to file their respective claims with the Clerk of this Court and to serve or mail to the proctors for petitioners a copy thereof on or before the 15th day of October, 1953, at 10:00 o'clock in the forenoon of that day and answer the allegations of the said petition; and

Whereas, the said Court having directed by an order made and entered on June 18, 1953, that a monition issue against all persons claiming damages for any loss of life, destruction, damage or injury occasioned by such sinking or arising during said voyage citing them to file their respective claims with the Clerk of this Court and serve or mail to the proctors for petitioners a copy thereof on or before October 15, 1953, at 10:00 o'clock in the forenoon of that day;

[fols. 15-16] You are therefore commanded to cite all persons claiming damages for any loss, damage, injury, loss of life or destruction done, occasioned or incurred by said sinking or upon said voyage to file their respective

claims with the Clerk of this Court and to serve or mail to the proctors for the petitioners a copy thereof on or before October 15, 1953, by publishing notice of such monition in substantially the form provided by Rule 51 of the Rules of Practice in Admiralty and Maritime cases in the Norfolk Virginian Pilot newspaper once each week for four successive weeks before the return date of the monition and also in the London Times newspaper once each week for four successive weeks before the return date of the monition.

You are also commanded to cite such claimants to appear and answer the petition herein on or before said last named date or within such further time as said Court may grant and to have and receive such relief as may be due.

Witness the Honorable Albert V. Bryan, Judge of the United States District Court for the Eastern District of Virginia, this 28th day of July, 1953.

Walkley E. Johnson, Clerk, by P. J. Riley, Jr., Deputy Clerk.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

CLAIM FOR DAMAGES—Filed August 6, 1953

And now come the claimants, W. G. Haslam, C. B. Langley, Mrs. V. E. Langley, B. M. White, K. S. Warren, H. A. Roberts, M. J. Ball, D. J. Hunter, H. R. Greaves, J. Haslock, L. Monkton, J. C. B. Exton, E. J. O'Sullivan, A. E. Roberts, D. Gower, B. R. Cook, Marcia Matthews, Gerald C. Hale, Cahn & Bendit, Ltd., and Hans Roeder, by their attorneys John W. Oast, Jr. and Dow & Symmers, and in accordance with the stipulation between the proctors for the United States of America, Lester S. Parsons, Jr., United States Attorney, and proctors for the said claimants, John W. Oast, Jr. and Dow & Symmers, make their respective claims against the above named United States of America as owner of the said steamship USNS HAITI VIC-

TORY for their respective damages, resulting from the loss of personal effects as per the schedule thereof hereto attached and hereby made a part hereof per the aforesaid stipulation.

Said claimants respectively aver that they are respectively individuals, corporations and/or partnerships respectively residing or doing business in England, United States of America or other countries as set forth in the annexed schedule and were respectively passengers and/or owners of cargo and/or baggage and/or personal effects on board the S/S DUKE OF YORK, the steam ferry owned and operated by the British Railways Ltd. on May 6, 1953, while the said vessel was on a voyage between Holland and Harwich, England; and when the said USNS HAITI VICTORY collided with the S/S DUKE OF YORK at approximately 4:16 A. M. on said May 6, 1953, at a point about [fol. 18] one mile off of Galloper Lightship in the English Channel with the result that the said steamship S/S DUKE OF YORK was cut and broken in two parts, the said claimants respectively suffered their respective damages as set forth in their respective schedules hereto attached and made a part of this claim as fully as if herein repeated in words and figures.

The said claimants aver that the said collision was not caused or contributed to by any fault or wrongdoing by the said claimants respectively, but was wholly due to the fault and negligence of those in charge of the said USNS HAITI VICTORY who were then employees of the United States of America acting in the scope of their employment in and about the navigation of the said USNS HAITI VICTORY.

Wherefore, the said claimants respectively present their respective claims for damages and interest thereon as set forth in the aforesaid schedule hereto attached.

John W. Oast, Jr., Proctor for Claimants.

Duly Sworn to by John W. Oast, Jr. Jurat omitted in printing.

Claimant	Address	Nature of Loss	Status of Claimant	Amount of Claim

SCHEDULE

Claimant	Address	Nature of Loss	Status of Claimant	Amount of Claim
1. Haslam W. G.	14 Greystoke Lodge Hangar Lane, W. 5.	personal effects	passenger	$66.00
2. Langley C. B.	26 Cambridge Park Court Twickenham	personal effects	passenger	86.60
3. Langley Mrs. V. E.	–do–	personal effects	passenger	182.28
4. White B. M.	20 Crawford Gardens, Palmers Green, N. 13.	personal effects	passenger	20.70
5. Warren K. S.	8 Cowdrey Close, Enfield, Middlesex	personal effects	passenger	103.44
6. Roberts H. A.	20 Overbury Avenue, Beckenham	personal effects	passenger	80.82
7. Ball M. J.	50 Drapers Road, Enfield, Middlesex	personal effects	passenger	24.22
8. Hunter D. J.	62 Fairdene Road, Coulsdon, Surrey	personal effects	passenger	91.32
9. Greaves H. R.	30 Glenthorne Avenue, Croydon, Surrey	personal effects	passenger	38.20
10. Haslock J.	15 Barnsbury Crescent, Tolworth, Surbiton	Personal effects	passenger	183.46
11. Monkton L.	30 Dallas Road, Hendon, N. W. 4.	personal effects	passenger	4.60
12. Exton J. C. B.	44 Manor Way, Ruislip, Middlesex	personal effects	passenger	17.48
13. O'Sullivan E. J.	48 Southbourne Avenue, Colindale, N. W. 9.	personal effects	passenger	43.56
14. Roberts A. J.	30 Merchiston Road, Catford, S. E. 6.	personal effects	passenger	10.48
15. Gower D.	14 Station Road, Hampton Wick, Surrey.	personal effects	passenger	66.56
16. Cook B. R.	27 Cambridge Park Court Twickenham	personal effects	passenger	11.90
17. Matthews, Marcia	Staithe, Coast Road, West Mersea, England	baggage and personal effects	passenger	2,000.00
18. Hale, Gerald C.	Treforest, Glamorgan	personal effects	passenger	140.00
19. Cahn & Bendit, Ltd.	51/55 Weymouth St., London, W. 1.	clips & frames ladies handbags	consignee	649.60
20. Roeder Hans	Hamburg, Germany	personal effects	passenger	226.80

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

CLAIM OF L. T. SEAWELL, JR., ADMINISTRATOR OF THE ESTATE OF FERDINAND VODICKA, DECEASED—Filed September 29, 1953

Now comes L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodica, Deceased, and states as follows:

I am a resident of the City of Norfolk, Virginia, and the Administrator of the Estate of Ferdinand Vodicka, Deceased, having qualified as such in the Clerk's Office of the Circuit Court of the City of Norfolk, Virginia, on September 10, 1953.

On May 6, 1953 the said Ferdinand Vodicka while traveling as a paid passenger on board the steamship DUKE OF YORK lost his life as a result of the collision between the steamship DUKE OF YORK and the USNS HAITI VICTORY in the English Channel.

I am informed and believe that the collision between the steamship DUKE OF YORK and the USNS HAITI VICTORY, and the subsequent loss of life of Ferdinand Vodicka was not caused by or contributed to through any fault or negligence on the part of the said Ferdinand Vodicka, but was caused solely or contributed to by the fault and negligence of the petitioner, United States of America, as owner of the USNS HAITI VICTORY, its servants, agents, or employees in charge of said vessel and/or the United States of America or its operating agencies, and by and through the unseaworthiness of the USNS HAITI VICTORY.

I, as Administrator of the Estate of Ferdinand Vodicka, Deceased, do hereby make claim for damages for death and loss of personal effects of the said Ferdinand Vodicka, and for the conscious pain and suffering suffered by the [fol. 38] said Ferdinand Vodicka prior to his death in the total sum of One Hundred Fifty One Thousand Five Hundred Dollars ($151,500.00), no part of which has been paid.

for the benefit of the distributees of his estate and any others that may be entitled to participate therein.

L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, Deceased.

Hughes, Little & Seawell, Proctors for Claimant, 936 Wainwright Bldg., Norfolk, Virginia.

Duly sworn to by L. T. Seawell, Jr. Jurat omitted in printing.

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

ANSWER OF L. T. SEAWELL, JR., ADMINISTRATOR OF THE ESTATE OF FERDINAND VODICKA, DECEASED—Filed September 29, 1953

To the Honorable Albert V. Bryan, Judge of the Court aforesaid:

The answer of L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, Deceased, to the petition of the United States of America, as owner of the USNS HAITI VICTORY for exoneration from or limitation of liability, alleges on information and belief, as follows:

First: Respondent duly qualified as Administrator of the Estate of Ferdinand Vodicka, Deceased, on the 10th day of September, 1953, in the Circuit Court of the City of Norfolk, Virginia, a court of competent jurisdiction, as is shown by the attached certificate of qualification, and as such is the legal administrator of the estate of the said decedent.

Second: Answering the allegations of the first article of the said petition, respondent admits same.

Third: Answering the allegations of the second article

of said petition, respondent denies that the USNS HAITI VICTORY was tight, staunch, strong and seaworthy and in all respects fitted for the voyage. Respondent calls for proof of the remaining allegations of said article.

Fourth: Answering the allegations of the third article of said petition, respondent admits same.

Fifth: Answering the allegations of the fourth article of said petition, respondent is not advised and calls for strict proof of said allegations, if material.

[fol. 40] Sixth: Answering the allegations of the fifth article of said petition, respondent denies that those in charge of the USNS HAITI VICTORY were competent and skilled, or that the USNS HAITI VICTORY was in all respects seaworthy, properly manned, equipped and supplied. On information and belief respondent further denies the facts alleged relative to the radar the vessel's course changes and signals prior to and at the time of the collision and calls for strict proof as to the remaining allegations of said article.

Seventh: Answering the allegations of the sixth article of said petition, respondent denies same. On the contrary this respondent alleges that petitioner's negligence, carelessness and inattention, or the negligence, carelessness and inattention of petitioner's agents, servants or employees, and/or the unseaworthy condition of the USNS HAITI VICTORY was the sole or contributing cause of respondent's decedent's death. Respondent is not informed as to the specifications of fault numbered one through eleven alleged against the DUKE OF YORK and those in charge of her, but calls for strict proof thereof.

Eighth: Answering the allegations of the seventh article of said petition, respondent denies the same, and affirmatively states that knowledge of the master and operating officer, among other servants of the petitioner, United States of America, of negligence which contributed in any way to the collision between the DUKE OF YORK and the USNS HAITI VICTORY must be deemed conclusively the privity or knowledge of the owner of the said USNS HAITI VICTORY.

Ninth: Answering the allegations of the eighth article of said petition, respondent alleges that Ferdinand Vodicka lost his life as a result of this collision. Respondent states

that it has no information concerning the remaining allegations of the eighth article and calls for proof thereof.

Tenth: Answering the allegations of the ninth article of said petition, respondent is not informed as to the allegations contained therein, and calls for strict proof thereof.

[fol. 41] Eleventh: Answering the allegations of the tenth article of said petition, respondent is not informed as to the allegations contained therein and calls for proof thereof.

Twelfth: Answering the allegations of the eleventh article of said petition, respondent is not informed thereof, and calls for proof, if material.

Thirteenth: Answering the allegations of the twelfth article of said petition, respondent denies that the said petitioner is entitled to the benefits of limitation of liability provided by applicable statutes or any rules of practice of the Supreme Court and of this Honorable Court.

Fourteenth: Answering the allegations of the thirteenth article of said petition, respondent admits same.

Fifteenth: Answering the allegations of the fourteenth article of said petition, this respondent admits the jurisdiction of this Honorable Court but denies that the premises all and singular are true.

Sixteenth: In answer to the wherefore clause of said petition, this respondent believes, and therefore alleges, that the prayers contained therein should be denied and the said petition for limitation of liability should be dismissed.

And further answering, respondent states that Ferdinand Vodicka was an Austrian National, who boarded the DUKE OF YORK, after having duly purchased and paid for a ticket at the Hook of Holland, on the 5th day of May, 1953, for a voyage to Harwich. During said voyage, and while said Ferdinand Vodicka was travelling as a passenger, the DUKE OF YORK was collided with by the USNS HAITI VICTORY on the early morning of May 6, 1953. As a result of the said collision, the DUKE OF YORK was almost cut in two and was otherwise seriously damaged, there were many personal injuries, several of those on the DUKE OF YORK lost their lives, and the passengers on the DUKE OF YORK sustained a considerable loss of baggage and other personal effects. Respondent's decedent was free from any negli-

ence, carelessness or inattention causing or contributing n any way to said collision and resulting losses. Said col- ision was due solely or was contributed to by the fault, egligence, carelessness and inattention of the United States of America, as owner, the managing agent or agents f the USNS HAITI VICTORY, her officers, employees and fol. 42] crew

(a) In failing to maintain said vessel in a safe and seaworthy condition;

(b) In failing to properly furnish and equip said vessel with proper life saving equipment, amongs other things;

(c) In ordering and permitting said vessel to proceed on the voyage in an unseaworthy, unsafe condition;

(d) In failing to promulgate and enforce proper regulations for the safe operation of said vessel;

(e) In permitting said vessel to be operated, in view of existing weather conditions, at a dangerous, excessive and improper speed;

(f) In permitting said vessel to proceed through a mist or conditions of reduced visibility without using the radar with which she was equipped;

(g) In permitting said vessel to proceed through mist and conditions of reduced visibility without sounding fog signals;

(h) In failing to navigate in accordance with whistle signals;

(i) In failing to have trained and competent officers and crew properly stationed;

(j) In failing to seasonably stop and reverse her engines;

(k) In failing to navigate in accordance with the accepted rules of navigation;

(l) In other respects to be brought out at the trial hereof.

Respondent's decedent at the time of his death was a trong, robust man, with a very responsible position and rospects for substantial advancement in his business.

Respondent's decedent left surviving him his wife, Mrs. largarete Vodicka, and two daughters, Mrs. Margarete

Maider and Helga Vodicka, who have been deprived of his care, guidance, love, protection, financial support and the expectancy of future pecuniary benefit all to their loss and damage. Said survivors have sustained damages in the sum of at least One Hundred Fifty Thousand Dollars ($150,000.00), no part of which has been paid. In addition thereto certain personal property and effects of the respondent's decedent of the value of Fifteen Hundred Dol-
[fol. 43] lars ($1500.00) were lost.

Respondent, by reason of the facts aforesaid, has a right of action for the decedent's wrongful death under and pursuant to the Death On The High Seas Act, Title 46 U. S. C. A. Sec. 761, the General Admiralty Law, and under other statutes of the United States or other nations governing such claims.

Respondent therefore states that all and singular the premises alleged in the further answering clause are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent prays that the said petitioner may be adjudged liable for the wrongful death of said Ferdinand Vodicka, reserving unto respondent all rights and benefits to which he is entitled under and by virtue of the aforesaid Death On The High Seas Act, The General Admiralty Law, and other statutes of the United States and other nations governing this claim; that a judgment may be ORDERED herein for respondent for the amounts claimed against said petitioner and petitioner's interest in the said USNS HAITI VICTORY; and that respondent may have such other and further relief as may be just and proper in the premises.

L. T. Seawell, Jr., Administrator of the Estate of Ferdinad Vodicka, Deceased, By L. T. Seawell, Jr.

Duly sworn to by L. T. Seawell, Jr. Jurat omitted in printing.

[fols. 43a-81] CERTIFICATE OF QUALIFICATION

VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 10th day of September, 1953.

I, W. R. Hanckel, Clerk of the Circuit Court of the City of Norfolk, in the State of Virginia, do certify that it appears from the records of the said Court, on file in my office, that L. T. Seawell, Jr., duly qualified, on the 10th day of September, 1953, as Administrator of the estate of Ferdinand Vodicka, deceased, and duly executed and acknowledged a bond as prescribed by law, in the penalty of $100.00, conditioned according to law, without surety, the law requiring none of him as such.

Given under my hand and the seal of said court, the day and the year first herein above written.

[Seal.] W. R. Hanckel, Clerk.

[fols. 82-183] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

CLAIM OF JOHN B. MESKERS—Filed October 8, 1953

Wout Meskers
Wholesale Bulbgrowers and Exporters
Julianadorp (N.-H.) - Holland
Phone (K 2235) No. 269

Hyacinths - Tulips - Daffodils - Crocuses, Etc.
Cable-Address: Wout Meskers, Julianadorp-Holland

The Clerk, United States Court House
Granby Street, Norfolk, Virginia

Thundersley, 5-10-'53
Essex, England.

Office of the Judge Advocate
Claims Branch, Hq. USAREUR
APO 403, U. S. Army

Dear Sirs,—

I am writing under oath that I was a passenger of the "H. S. Duke of York" at its collision with the "USNS Haity Victory" on the 6th of May 1953, as a consequence

of which I lost the following personal affects belonging to me:

	£ s. d.
1 pair pyjamas	1.10.—
9 shirts	6.15.—
2 suits	29.—.—
3 sets underwear	2. 5.—
6 pair socks	1.15.—
20 handkerchiefs	—.14.—
1 wristwatch (gold)	15.—.—
1 expanding suitcase (revelation)	5.15.—
Business stationary	2.15.—
1 pair shoes	3.—.—
1 pair sandels	1.10.—
200 cigarettes (Dutch)	—.15.—
100 cigarettes (English)	—.12. 6
10 cigars (Dutch)	—. 5.—
1 cardigan (jaeger)	2. 5.—
I therefore file a claim for the amount of	73.16. 6

against the owners of the "Haiti Victory."

Yours Faithfully, John B. Meskers.

English address: John B. Meskers, c/o N. C. Newman, "Shenstone", Grand View Rd,, Thundersley, Essex.

[fol. 184] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

CLAIM OF BRITISH TRANSPORT COMMISSION FOR $1,500,000.00 —Filed October 14, 1953

And now, British Transport Commission makes claim against the petitioner, The United States of America, and

presents the proof of claim against the petitioner herein, as follows:

1. The claimant, British Transport Commission, at all times hereinafter mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and maintains a principal office and place of business at Paddington Station, London, W. 2, England.

2. At all times material herein the claimant was, and still is, the owner of the passenger-cargo vessel DUKE OF YORK, a twin screw vessel of British registry, of the burden of 3,759 gross tons and 1,938 net tons, 339′ in length, 52′ in beam and 18′ in depth, which said vessel was, at all times prior to the events hereinafter described, tight, staunch, strong and in all respects seaworthy.

3. On the early morning of May 6, 1953 the said SS DUKE OF YORK while proceeding through the North Sea, en route from the Hook of Holland to Harwich, England, came into collision with the U. S. N. S. HAITI VICTORY, a vessel owned and operated by the petitioner herein as a public vessel of the United States, in the vicinity of Galloper Lightship.

[fol. 185] 4. As a result of the said collision the bow of the DUKE OF YORK was severed and grievous damage was sustained to the vessel, by reason of which she was required to receive and accept the assistance of salving vessels to bring her safely to the port of Harwich. Further, certain passengers on board the DUKE OF YORK were killed, injuries were sustained by various other passengers and loss and damage was sustained to cargo on board. The total amount of the claims arising from these losses, damages, injuries, death and destruction are not exactly known or determined presently but, so far as can be ascertained, will amount to approximately $1,500,000.00.

The aforesaid damages, injuries, losses, death and destruction resulting from the collision above mentioned were not caused or contributed to by any fault or negligence of this claimant or of anyone for whose acts or omissions this claimant is or was responsible but were done, occasioned or incurred with the privity or knowledge of and were caused by the petitioner and its managing officers and supervising agents and the master of the U. S. N. S. HAITI VICTORY, and

of those in charge of her. The circumstances of the said collision and the fault and negligence of the petitioner in respect thereof are set forth in the answer of claimant to the petition filed herein and the allegations of the said answer are hereby referred to and made part of this claim.

5. By reason of the premises claimant has suffered damages, so nearly as can be presently ascertained, in the sum of $1,500,000.00, which sum may be increased by the ascertainment or realization of claims which now have been or may hereafter be asserted against petitioner.

[fol. 186] Wherefore, claimant, reserving the right to file a supplemental claim herein, prays that its claim for One Million Five Hundred Thousand ($1,500,000.00) Dollars be approved and allowed by the Court, with interest and costs, and for such other and further relief as to the Court may seem just and proper.

Baird, White & Lanning, Edwin Longcope, McNutt & Nash, Proctors for Claimant, British Transport Commission, Office and P. O. Address, National Bank of Commerce Building, Norfolk 10, Virginia.

[fol. 187] *Duly sworn to by Edward R. Baird. Jurat omitted in printing.*

[fol. 188] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION.

[Title omitted]

ANSWER—Filed October 14, 1953

The Answer of the claimant, British Transport Commission, to the Petition of the United States of America, in a cause of exoneration from and limitation of liability, civil and maritime, alleges upon information and belief as follows:

First: It denies knowledge or information sufficient to form a belief as to the allegations of the First Article of the Petition and demands proof thereof.

Second: It denies knowledge or information sufficient to form a belief as to the allegations of the Second Article of the Petition and demands proof thereof.

Third: It admits the allegations of the Third Article of the Petition.

Fourth: It denies knowledge or information sufficient to form a belief as to the allegations of the Fourth Article of the Petition and demands proof thereof.

Fifth: It admits that the HAITI VICTORY was in collision with the DUKE OF YORK in the early morning of May 6, 1953, in the North Sea and in the vicinity of Galloper Lightship, as a result of which great damage and injury was caused to the DUKE OF YORK and to passengers and persons on board said vessel. Except as so admitted, or elsewhere in this answer alleged, it denies the allegations of the Fifth Article of the Petition.

[fol. 189] Sixth: It denies the allegations of the Sixth Article of the Petition.

Seventh: It denies the allegations of the Seventh Article of the Petition.

Eighth: It admits that the DUKE OF YORK was cut in two by the collision and that her owners, the claimants herein, have filed claim against Petitioner for damages of $1,500,000.00, reserving leave to supplement the same; that eight persons were killed on board the DUKE OF YORK as a result of the collision; that other persons on board were injured, and that claims have been asserted for loss and damage to cargo, baggage and personal effects on board the vessel. Except as so admitted claimant denies knowledge or information sufficient to form a belief as to the allegations of the Eighth Article of the Petition.

Ninth: It denies knowledge or information sufficient to form a belief as to the allegations of the Eighth Article of the Petition and demands proof thereof.

Tenth: It denies knowledge or information sufficient to form a belief as to the allegations of the Tenth Article of the Petition and demands proof thereof.

Eleventh: It admits that claims have been or will be filed against Petitioner in consequence of losses and damages sustained to said vessel, its passengers and cargo, but it denies knowledge or information sufficient to form a belief as to whether the total of these claims does or

will exceed the value of Petitioner's interest in the HAITI VICTORY and her pending freight and demands proof thereof.

Twelfth: It denies that Petitioner has any valid defense in fact and on the law, to its asserted liability for the losses and damages resulting from the collision herein described, and further denies that Petitioner is entitled [fol. 190] to the benefits of limitation of liability as provided in Sections 4283, 4284, 4285 and 4286 of the Revised Statutes (46 U. S. C. A. 183-186) and of the various statutes supplementary thereto and amendatory thereof.

Thirteenth: It admits the allegations of the Thirteenth Article of the Petition.

Fourteenth: It admits the jurisdiction but denies that all and singular the premises of the Petition are true.

Further answering the petition claimant avers, upon information and belief, that the true facts relative to the collision therein described are as follows:

Fifteenth: On the early morning of May 6, 1953, a twin-screw cargo passenger vessel of 3759 gross tons and 1938 net tons, 339 feet in length and 52 feet in beam, being in all respects tight, staunch, strong and seaworthy, was proceeding across the North Sea, enroute from the Hook of Holland to Harwich, England, on her regular service between these ports. She was carrying 437 passengers and miscellaneous cargo. The vessel was showing regulation navigations lights and also her deck lights. There was a light northwesterly breeze, a force 2, the sea was moderate, with a slight swell and the tide was flooding southwesterly, at about a ½ knot. The master was on the bridge, in charge of the vessel's navigation. A competent helmsman was at the wheel and a proper lookout was being maintained.

In the course of the DUKE OF YORK's crossing patchy fog had been encountered from time to time. At 0330 the vessel commenced sounding fog signals and at 0412 the engines were reduced to half speed.

[fol. 191] Shortly thereafter, and while the DUKE OF YORK was so proceeding, a single long blast was heard, bearing about four points on the port bow. The DUKE OF YORK rang her engines to slow and answered with a single long blast. Shortly thereafter the masthead lights and green light of the other vessel, which later proved to be the HAITI

VICTORY, appeared on the same bearing and close aboard. The DUKE OF YORK put her engines full astern and sounded three blasts, and put her wheel hard to starboard, but the HAITI-VICTORY came on and with great force her bow struck the port side of the DUKE OF YORK, just forward of the latter's bridge, at an angle of about six points leading aft, and penetrated almost to the starboard side of the DUKE OF YORK. The collision occurred at about 0418 and in the vicinity of Galloper Light Vessel.

The HAITI VICTORY held her bow into the DUKE OF YORK for a while, then withdrew and manoeuvred alongside and assisted in removing passengers from the DUKE OF YORK. Five passengers were killed in the collision; one was injured and subsequently died, and two were missing and are presumed to have been injured and loss or damage was sustained to cargo, baggage and personal effects on board the DUKE OF YORK.

The bow of the DUKE OF YORK fell off and sank while the HAITI VICTORY was still alongside removing passengers and crew. Prior thereto tug assistance had been summoned by the DUKE OF YORK and three tugs arrived on the scene after the bow of the DUKE OF YORK had fallen off. When it was observed that the DUKE OF YORK would remain afloat she was taken in tow by the tugs and was subsequently brought safely into the harbor of Harwich. [fol. 192] Further answering the petition claimant alleges, upon information and belief, as follows:

Sixteenth: The collision described by Petitioner in Article Fifth hereof, and the losses, damages, injuries, deaths and destruction resulting therefrom, including those mentioned in the claim filed by this claimant, were not caused or contributed to by any fault or negligence on the part of this claimant, or of any one for whose acts or omissions this claimant was or is responsible, but were done, occasioned or incurred with the privity or knowledge of and were caused by the Petitioner and its managing officers and supervising agents and the master of the HAITI VICTORY, and those in charge of her, in the following respects, among others, which will be shown on the trial:

1. She was not in charge of a competent master;
2. She was not in charge of competent persons;

3. She was unseaworthy;

4. She was proceeding at excessive speed in fog;

5. She was maintaining full speed on approaching a fog bank;

6. She failed to make proper use of her radar;

7. As the burdened vessel in a crossing situation she failed to take any or proper action to navigate clear of the DUKE OF YORK.

8. She altered course with respect to a vessel not then in sight;

9. She failed to sound proper whistle signals;

10. She failed to maintain a proper or competent lookout;

11. She failed to take proper precautions to avoid collision when the danger of collision was or should have been apparent.

[fol. 193] Seventeenth: All and singular, the premises are true.

Wherefore, claimant prays that the petition herein be dismissed with costs and that petitioner's prayer for exoneration from or limitation of liability be denied; that petitioner may be held liable in full to claimant for all liabilities, losses, damages and destruction sustained in the premises; and that claimant may have such other and further relief as to the Court may seem just and proper.

Baird, White & Lanning, Edwin Longcope, McNutt & Nash, Proctors for Claimant, British Transport Commission, Office & P. O. Address, National Bank of Commerce Building, Norfolk 10, Virginia.

[fols. 194-266] *Duly sworn to by Edward R. Baird. Jurat omitted in printing.*

[fols. 267-389] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF PUBLICATION—Filed October 22, 1953

THE TIMES

1785

Advertisement Department
The Times Publishing Company, Limited,
Priting House Square,
London, E.C.4.

Telephone: Central 2000

This is to certify that the attached advertisement appeared in the issues of The Times of August 24, 31, Sept. 7, 14, 1953 under the heading Public Notices.

—— ——, Classified Advertisement Manager.

Note: Voucher copies of The Times for the above-mentioned date, or dates, are not available owing to restriction of printed copies by Government regulation of the use of newsprint.

United States District Court of the Eastern District of Virginia, Norfolk Division

Notice of Petitioner for Exoneration from or Limitation of Liability Filed June 18, 1953

Notice is given that the United States of America has filed a petition pursuant to Title 46, U. S. Code, sections 183-189 and 789, claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the USNS HAITI VICTORY from New York City to Bremerhaven, Germany, terminating on May 8, 1953, at Bremerhaven. All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the United States Court House at Granby Street, Post Office Building, Norfolk, Virginia, and serve on or mail to the petitioner's proctors, L. S. Parsons, Jr., United States At-

torney, and John M. Hollis, Assistant United States Attorney, at Granby Street, Post Office Building, Norfolk, Virginia, a copy on or before October 15, 1953, or be defaulted. Personal attendance is not required. Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

R. A. Simpson, United States Marshal.

Admiralty Rule 52

Filing and Proof of Claim in Limited Liability Proceedings

Claims shall be filed with the Clerk of the Court in writing under oath and a copy shall be served upon the proctor for the petitioner on or before the return day of the monition. Each claim shall specify the various allegations of fact upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. Within thirty days after the return day of the monition or within such time as the Court thereafter may allow, the petitioner shall mail to the proctor for each claimant (or if the claimant have no proctor the claimant himself), a list setting forth (a) the name of each claimant, (b) the name and address of his proctor or attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, &c., and (d) the amount thereof.

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage, or, in case of wreck, the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the Court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, &c., and her freight; and if the Court finds that the amount of the interim stipulation is either insufficient or excessive, the Court shall make an order for the payment of the proper amount into Court, or,

as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the Court, or before the Court as the Court may determine, subject to the right of any person interested to question or controvert the same; but no objection to any claim need be filed by any party to the proceedings; and on the completion of said proofs, the commissioner shall make report, or the Court its findings on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the Court, the moneys paid or secured to be paid into Court as aforesaid or the proceeds of said vessel, or her wreckage, &c., and freight (after payment of costs and expenses shall upon determination of liability be divided pro rata, subject to all provisions of law thereto, appertaining, amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

[fol. 390] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

ANSWER OF PETITIONER TO CLAIM OF BRITISH TRANSPORT COMMISSION—Filed April 16, 1954

The answer of the United States of America, petitioner herein, to the claim of the British Transport Commission alleges as follows:

1. Admits that the claimant, British Transport Commission, is organized and existing under the laws of the United Kingdom; that it maintains its principal office and place of business in London; but denies that the Commission is a corporation, and refers particularly to the provisions of

the statute creating it as a public authority, 10 and 11 Geo. VI, ch. 49 (1947).

2. Admits that the claimant was the owner of the DUKE OF YORK bearing the same descriptions, but denies that the said vessel was tight, staunch, strong, and in all respects seaworthy.

3. Admits the allegations of Article Third of the claim.

4. Admits the collision and the injury and claims in the amount of about $1,500,000, but denies all the other allegations of Article Fourth of the claim.

5. Denies the allegations of Article Fifth of the claim.

Further answering, and for a second separate and complete defense, petitioner alleges as follows:

6. The said collision complained of, which is the subject of the limitation petition filed herein, was occasioned by either the sole fault of the DUKE OF YORK or the joint fault [fol. 391] of both the DUKE OF YORK and the HAITI VICTORY; in which case petitioner herein alleges that it has sustained damage to its vessel in the amount of about $65,000, as nearly as can be presently ascertained, and has also been subjected to claims by passengers and members of the crews of both vessels filed herein, which presently approximate $809,714 for personal injury and death, and $45,975 for property damage other than that claimed by the DUKE OF YORK; all of which damage it prays to set off and recoup against the claimant, British Transport Commission, as owner of the DUKE OF YORK; in the manner provided by the maritime rule of divided damages as applied by courts of the United States.

Further answering, and for a third separate and complete defense, petitioner alleges as follows:

7. The DUKE OF YORK was owned and operated by a statutory agency of the Government of the United Kingdom of Great Britain and Northern Ireland, pursuant to the Transport Act of 1947, 10 and 11 Geo. VI, ch. 49, as amended by the Transport Act of 1953, 1 and 2 Eliz. II, ch. 13.

8. At the time of said collision and to date there exists between the Government of the United Kingdom of Great Britain and Northern Ireland and your petitioner an Exec-

utive Agreement signed at London on December 4, 1942, printed in 56 Stat. 1780. Pursuant to the provisions of that Agreement, any and all claims on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland or any governmental agency owning and operating the DUKE OF YORK were waived as against the United States, and pursuant to Article Second of that Agreement the claim is to be asserted in limitation proceedings for the purpose of marshalling but not for payment. Although called upon to do so, the public authority owning and operating the DUKE OF YORK has failed and refused and has contended and does still contend that its operations and its [fols. 392-410] vessels are outside the scope of the Agreement.

Wherefore, petitioner prays that the Court adjudicate such set-offs, recoupments and cross-claims against the said DUKE OF YORK and her owners, as may exist in this action, and that evidence be taken on the application of said Executive Agreement to the facts of the case and the said Agreement applied.

L. S. Parsons, Jr., United States Attorney.

To: Baird, White & Lanning, Bank of Commerce Building, Norfolk, Virginia.

Hughes, Little & Seawell, 936 Wainwright Building, Norfolk, Virginia.

Jett, Sykes & Howell, Attorneys at Law, 701 Citizens Bank Building, Norfolk, Virginia.

John W. Oast, Jr., Esq. and Messrs. Dow & Symmer, Citizens Bank Building, Norfolk, Virginia.

Vandeventer, Black & Meredith, Citizens Bank Building, Norfolk, Virginia.

Earl W. White, Esq., Dean Building, Norfolk, Virginia.

C. Lydon Harrell, Jr., Esq., Dickson Building, Norfolk, Virginia.

John P. Parrish, Esq., 111 South Fairfax, Alexandria, Virginia.

Certificate of service (omitted in printing).

[fol. 411] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

ORDER—May 3, 1954

This day came William B. Eley, Administrator of the Estate of Dale M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, and certain personal injury and baggage claimants by their respective proctors and presented their several motions for leave to file petitions herein impleading British Transport Commission as owner of the SS DUKE OF YORK, and also came the said British Transport Commission by proctors and objected thereto on the ground, among others, that such claimants have no right to implead the said Commission herein;

And the Court having heard the arguments of proctors doth reserve the objections of the British Transport Commission for hearing and determination and doth set the same for hearing on June 1, 1954 at 2:30 P. M. in the courtroom at Newport News; meanwhile, and subject to the further order of the Court, leave is hereby granted to the claimants above named and identified to file their said petitions herein, and the same are accordingly filed.

Albert V. Bryan, United States District Judge.

May 3, 1954.

[fol. 412] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

IMPLEADING PETITION OF WILLIAM B. ELEY UNDER ADMIRALTY RULE NO. 56—Filed May 3, 1954

The petition of William B. Eley, Administrator of the estate of Dale M. Chaney, against the British Transport

Commission, filed pursuant to Rule No. 56 of the Rules of Practice in admiralty and maritime cases, alleges on information and belief as follows:

First: Petitioner duly qualified as administrator of the estate of Dale M. Chaney, deceased, on the 13th day of October, 1953, in the Circuit Court of the City of Norfolk, a court of competent jurisdiction, and as such is the legal administrator of the estate of the said decedent.

Second: British Transport Commission is and was at all times hereinafter mentioned, an agency of the British Government, and was at all times hereinafter mentioned, owner and operator of the S. S. "DUKE OF YORK", and as a claimant-respondent in the original proceeding herein, is subject to the jurisdiction of this Honorable Court.

Third: On or about the 10th day of June, 1953, a petition for exoneration from or limitation of liability was filed by the United States of America as owner of the USNS "HAITI VICTORY", which said petition, among other things, alleged that on May 6, 1953, while on a voyage from Argentia to Bremerhaven, Germany, the USNS "HAITI VICTORY" was in collision with the S. S. "DUKE OF YORK", which said collision, the petition further alleged, was caused by the fault and neglect of the S. S. "DUKE OF YORK" and the persons in charge of her.

Fourth: On October 13th, 1953, petitioner filed his claim and answer in the said limitation proceeding alleging, among other things, that the said collision was caused or [fol. 413] contributed to by the fault or neglect on the part of the USNS "HAITI VICTORY", or those in charge of her.

Fifth: Petitioner further alleges that on May 6th, 1953, his decedent, Dale M. Chaney, was a citizen of the United States and a Second Lieutenant in the United States Air Force, who, on the day before, May 5th, 1953, had boarded the S. S. "DUKE OF YORK" in proper fashion at the Hook of Holland for a voyage to Harwich; that during the said voyage, and while the said Dale M. Chaney was traveling as a passenger, the S. S. "DUKE OF YORK" was in collision with the USNS "HAITI VICTORY" during the early morning of May 6th, 1953, as a result of which petitioner's decedent lost his life and all of his personal effects were destroyed.

Sixth: The foregoing collision and resulting losses were not caused or contributed to in anywise by respondent's decedent, Dale M. Chaney, but the said collision was caused or contributed to by the fault and negligence of the S. S. "DUKE OF YORK" and British Transport Commission's servants and employees in charge of her navigation in the following particulars, among others, to be shown at the trial of this cause:

1. Respondent's servants and employees who were in charge of her navigation were not attentive to their duties and were not maintaining a proper and alert lookout.

2. She was being navigated at a rate of speed which was dangerous, excessive and improper in view of the existing conditions.

3. She was proceeding through a mist or conditions of reduced visibility without the sounding of fog signals.

4. The S. S. "DUKE OF YORK" was not maintained in a safe and seaworthy condition.

5. She was proceeding through a condition of reduced visibility without using the radar with which she was equipped.

6. She was not being navigated in accordance with the accepted rules of navigation.

7. She did not seasonably stop and reverse her engines.

[fol. 414] Seventh: By reason of the foregoing collision, the estate of Dale M. Chaney has been caused to suffer damages in the amount of One Hundred and Fifty Thousand ($150,000.00) Dollars, no part of which has been paid.

Eighth: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the petitioner prays that process in due form issue against the British Transport Commission, citing it to appear and answer all and singular the matters and things set forth in this petition; and that if the said British Transport Commission cannot be found in this district, its

goods and chattels, or any goods and chattels of the British Government within this district may be attached, to the amount sued for in the impleading petition herein, and that this court will decree the payment by said British Transport Commission to the petitioner herein, of the sum of One Hundred and Fifty Thousand ($150,000.00) Dollars, together with interest and costs; and that the petitioner may have such other and further relief as may be just.

William B. Eley, Administrator of the Estate of Dale M. Chaney, deceased.

Vandeventer, Black & Meredith, 819 Citizens Bank Bldg., Norfolk, Virginia, Proctors for Impleading Petitioner.

Duly sworn to by William B. Eley. Jurat omitted in printing.

[fol. 415] , [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

IMPLEADING PETITION OF JULIET ROBESON CHAMBERLAIN UNDER SUPREME COURT ADMIRALTY RULE NO. 56—Filed May 3, 1954

The petition of Juliet Robeson Chamberlain against the British Transport Commission filed pursuant to United States Supreme Court Admiralty Rule No. 56 of the rules of practice in admiralty and maritime cases, alleges on information and belief as follows:

First: Petitioner is a resident of the City of Philadelphia, Pennsylvania, and on May 6, 1953, at the time of the collision here involved was a passenger on the steamship "DUKE OF YORK".

Second: British Transport Commission is and was at all times hereinafter mentioned, an agency of the British

Government, and was at all times hereinafter mentioned the owner and/or operator of the Steamship "DUKE OF YORK", and as a claimant-respondent in the original proceeding herein is subject to the jurisdiction of this Honorable Court.

Third: On or about the 10th day of June, 1953, a petition for exoneration from or limitation of liability was filed by the United States of America as owner of the U. S. N. S. "HAITI VICTORY", which said petition, among other things, alleged that on May 6, 1953, while on a voyage from Argentina to Bremerhaven, Germany, the U. S. N. S. "HAITI VICTORY" was in collision with the Steamship "DUKE OF YORK", which said collision, the petition further alleged, was caused by the fault and neglect of the Steamship "DUKE OF YORK" and the persons in charge of said vessel.

Fourth: On September 13, 1953, petitioner filed her claim and answer in the said limitation proceeding alleging, among other things, that the said collision was caused or [fol. 416] contributed to by the fault or neglect on the part of the U. S. N. S. "HAITI VICTORY" or those in charge of said vessel.

Fifth: Petitioner further alleges that on May 6, 1953, at the time of the collision here involved petitioner was a citizen of the United States and a resident of the City of Philadelphia, Pennsylvania, who on or about May 5, 1953, after having duly purchased and paid for a ticket for a voyage from the Hook of Holland to Harwich, England, boarded the steamship "DUKE OF YORK" in proper fashion at the Hook of Holland. Thereafter, during the said voyage and while your petitioner was travelling as a paid passenger, the Steamship "DUKE OF YORK" was in collision with the U. S. N. S. "HAITI VICTORY" during the early morning hours of May 6, 1953, as result of which your petitioner was caused to sustain serious and permanent personal injuries and the loss of a considerable part of her baggage and other personal effects.

Sixth: The foregoing collision and resulting losses to your petitioner were not caused or contributed to in any wise by petitioner, but the said collision was caused or contributed to by the fault and negligence of the Steamship "DUKE OF YORK" and British Transport Commission's

servants, agents and employees in charge of the navigation, of said vessel in the following particulars, among others to be shown at the trial of this cause:

(1) Respondents' servants, agents and employees who were in charge of the navigation of the Steamship "DUKE OF YORK" were not attentive to their duties and were not maintaining a proper and alert lookout.

(2) The said vessel was being navigated at a rate of speed which was dangerous, excessive and improper in view of the existing conditions.

(3) The said vessel was proceeding through a mist or conditions of reduced visibility without the sounding of proper fog signals.

(4) The said vessel was not maintianed in a safe and seaworthy condition.

(5) The said vessel was proceeding through a condition of reduced visibility without using the radar with which she was equipped.

[fols. 417-418] (6) She did not seasonably stop and reverse her engines.

Seventh: By reason of the foregoing collision petitioner has been caused to suffer damages for injuries, loss of time, medical and other expenses, and for loss of baggage and personal effects in the amount of Twenty Five Thousand Dollars ($25,000.00), no part of which has been paid.

Eighth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays that process in due form of law may issue against the British Transport Commission, citing it to appear and answer all and singular the matters and things set forth in this petition; that if the said British Transport Commission cannot be found in this district its goods and chattels, or any goods and chattels of the British Government within this district, may be attached, to the amount sued for in this impleading petition, and that this Court will decree the payment by said British Transport Commission to the petitioner herein, of the sum of Twenty Five Thousand Dollars ($25,000.00), together with interest and costs; and that petitioner may

have all such other and further relief as may be just and proper in the premises.

Juliet Robeson Chamberlain, by R. Arthur Jett, of Proctors.

Jett, Sykes & Howell, 701 Citizens Bank Building, Norfolk 10, Virginia, Proctors for impleading petitioner, Juliet Robeson Chamberlain.

Duly sworn to by R. Arthur Jett. Jurat omitted in printing.

[fol. 419] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

IMPLEADING PETITION OF JOSEPH D. BACA UNDER ADMIRALTY RULE NO. 56—Filed May 3, 1954

The petition of Joseph D. Baca against the British Transport Commission, filed pursuant to Rule No. 56 of the Rules of Practice in admiralty and maritime cases, alleges on information and belief as follows:

First: British Transport Commission is and was at all times hereinafter mentioned, an agency of the British Government, and was at all times hereinafter mentioned, owner and operator of the steamship DUKE OF YORK, and as a claimant-respondent in the original proceeding herein, is subject to the jurisdiction of this Honorable Court.

Second: On or about the 10th day of June 1953, a petition for exoneration from or limitation of liability was filed by the United States of America as owner of the USNS HAITI VICTORY, which said petition, among other things, alleged that on May 6, 1953 while on a voyage from Argentia to Bremerhaven, Germany, the USNS HAITI VICTORY was in collision with the steamship DUKE OF YORK, which said collision, the petition further alleged, was caused

by the fault and neglect of the steamship DUKE OF YORK and the persons in charge of her.

Third: Petitioner has heretofore filed his claim, and on or about March 23, 1954 filed his amended claim and answer in the limitation proceeding alleging, among other things, that the said collision was caused or contributed to by the fault or neglect on the part of the USNS HAITI VICTORY, or those in charge of her.

Fourth: Petitioner further alleges that on May 6, 1953 he was a citizen of the United States and a Second Lieutenant in the United States Air Force, who, on the day before, May 5, 1953, had boarded the Steamship DUKE OF YORK in [fol. 420] proper fashion at the Hook of Holland for a voyage to Harwich; that during the said voyage, and while the said Joseph D. Baca was traveling as a passenger, the steamship DUKE OF YORK was in collision with the USNS HAITI VICTORY during the early morning of May 6, 1953, as a result of which petitioner suffered personal injuries and loss of his personal effects.

Fifth: The foregoing collision and resulting losses were not caused or contributed to in anywise by petitioner, Joseph D. Baca, but the said collision was caused or contributed to by the fault and negligence of the steamship DUKE OF YORK and British Transport Commission's servants and employees in charge of her navigation in the following particulars, among others, to be shown at the trial of this cause:

1. Respondent's servants and employees who were in charge of her navigation were not attentive to their duties and were not maintaining a proper and alert lookout.

2. She was being navigated at a rate of speed which was dangerous, excessive and improper in view of the existing conditions.

3. She was proceeding through a mist or conditions of reduced visibility without the sounding of fog signals.

4. The steamship DUKE OF YORK was not maintained in a safe and seaworthy condition.

5. She was proceeding through a condition of reduced visibility without using the radar with which she was equipped.

6. She was not being navigated in accordance with the accepted rules of navigation.

7. She did not seasonably stop and reverse her engines.

Sixth: By reason of the foregoing collision, petitioner has been caused to suffer damages in the amount of Twenty-five Thousand Dollars ($25,000.00), no part of which has been paid.

Seventh: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, petitioner prays that process in due form issue against the British Transport Commission, citing it to appear and answer all and singular the matters and things set forth in this petition; and that if the said British [fol. 421] Transport Commission cannot be found in this district, its goods and chattels, or any goods and chattels of the British Government within this district may be attached, to the amount sued for in the impleading petition herein, and that this Court will decree the payment by said British Transport Commission to the petitioner herein, of the sum of Twenty-five Thousand Dollars ($25,000.00), together with interest and costs; and that the petitioner may have such other and further relief as may be just.

Joseph D. Baca, By L. T. Seawell, Jr., Of Proctors.

Duly sworn to by L. T. Seawell, Jr. Jurat omitted in printing.

[fol. 422] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

IMPLEADING PETITION OF L. T. SEAWELL, JR., UNDER ADMIRALTY RULE NO. 56—Filed May 3, 1954

The petition of L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, Deceased, against the British Transport Commission, filed pursuant to Rule No. 56 of the Rules of Practice in admiralty and maritime causes, alleges on information and belief as follows:

First: Petitioner duly qualified as Administrator of the Estate of Ferdinand Vodicka, Deceased, on the 10th day of September, 1953 in the Circuit Court of the City of Norfolk, a court of competent jurisdiction, and as such is the legal administrator of the estate of the said decedent.

Second: British Transport Commission is and was at all times hereinafter mentioned, an agency of the British Government, and was at all times hereinafter mentioned, owner and operator of the steamship DUKE OF YORK, and as a claimant-respondent in the original proceeding herein, is subject to the jurisdiction of this Honorable Court.

Third: On or about the 10th day of June, 1953, a petition for exoneration from or limitation of liability was filed by the United States of America, as owner of the USNS HAITI VICTORY, which said petition, among other things, alleged that on May 6, 1953 while on a voyage from Argentia to Bremerhaven, Germany, the USNS HAITI VICTORY was in collision with the steamship DUKE OF YORK, which said collision, the petition further alleged, was caused by the fault and neglect of the steamship DUKE OF YORK and the persons in charge of her.

[fol. 423] Fourth: On September 29, 1953, petitioner filed his claim and answer in the said limitation proceeding alleging, among other things, that the said collision was caused or contributed to by the fault or neglect on the part of the USNS HAITI VICTORY or those in charge of her.

Fifth: Petitioner further alleges that on May 6, 1953 his

decedent, Ferdinand Vodicka was an Austrian National, who, on the day before, May 5, 1953, had boarded the steamship DUKE OF YORK in proper fashion at the Hook of Holland for a voyage to Harwich; that during the said voyage, and while the said Ferdinand Vodicka was traveling as a passenger, the steamship DUKE OF YORK was in collision with the USNS HAITI VICTORY during the early morning of May 6, 1953, as a result of which petitioner's decedent lost his life and all of his personal effects were destroyed.

Sixth: The foregoing collision and resulting losses were not caused or contributed to in anywise by respondent's decedent, Ferdinand Vodicka, but the said collision was caused or contributed to by the fault and negligence of the steamship DUKE OF YORK and British Transport Commission's servants and employees in charge of her navigation in the following particulars, among others, to be shown at the trial of this cause:

1. Respondent's servants and employees who were in charge of her navigation were not attentive to their duties and were not maintaining a proper and alert lookout.

2. She was being navigated at a rate of speed which was dangerous, excessive and improper in view of the existing conditions.

3. She was proceeding through a mist or conditions of reduced visibility without the sounding of fog signals.

4. The steamship DUKE OF YORK was not maintained in a safe and seaworthy condition.

5. She was proceeding through a condition of reduced visibility without using the radar with which she was equipped.

6. She was not being navigated in accordance with the accepted rules of navigation.

7. She did not seasonably stop and reverse her engines.

[fols. 424-429] Seventh: By reason of the foregoing collision, the estate of Ferdinand Vodicka has been caused to suffer damages in the amount of One Hundred Fifty-one

Thousand Five Hundred Dollars ($151,500.00), no part of which has been paid.

Eighth: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the petitioner prays that process in due form issue against the British Transport Commission, citing it to appear and answer all and singular the matters and things set forth in this petition; and that if the said British Transport Commission cannot be found in this district, its goods and chattels, or any goods and chattels of the British Government within this District may be attached, to the amount sued for in the impleading petition herein, and that this Court will decree the payment by said British Transport Commission to the petitioner herein, of the sum of One Hundred Fifty-one Thousand Five Hundred Dollars ($151,500.00), together with interest and costs; and that the petitioner may have such other and further relief as may be just.

L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, Deceased.

Hughes, Little & Seawell, 936 Wainwright Bldg., Norfolk, Virginia, Proctor for Impleading Petitioner.

Duly sworn to by L. T. Seawell, Jr. Jurat omitted in printing.

[fol. 430] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

MOTION TO IMPLEAD THE BRITISH TRANSPORT COMMISSION—Filed May 5, 1954

Now comes the undersigned, Oliver Gorm Clausen, and moves this Court to enter an order herein impleading the

British Transport Commission, as owner of the steamship DUKE OF YORK, as a party to this cause.

Oliver Gorm Clausen, By C. Lydon Harrell, Jr., His Counsel.

C. Lydon Harrell, Jr., 423 Kresge Building, Norfolk, Virginia.

NOTICE

To: Baird, White & Lanning, Bank of Commerce Building, Norfolk, Va.

Hughes, Little & Seawell, Wainwright Building, Norfolk, Virginia.

Vandeventer, Black and Meredith, Citizens Bank Building, Norfolk, Virginia.

John W. Oast, Jr., Citizens Bank Building, Norfolk, Virginia.

Jett, Sykes, & Howell, Citizens Bank Building, Norfolk, Virginia.

John M. Hollis, Asst. U. S. Atty., Post Office Building, Norfolk, Virginia.

Earl W. White, Dean Building, Norfolk, Virginia.

John P. Parrish, 111 South Fairfax St., Alexandria, Va.

Please, take notice that on June 1, 1954, at 10:00 o'clock A. M., or as thereafter as I may be heard, I will pray to the Court that the above motion be brought on for hearing.

Oliver Gorm Clausen, By C. Lydon Harrell, Jr., His Counsel.

Certificate of Service (omitted in printing).

[fol. 431] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

REQUEST FOR ADMISSION DIRECTED TO CLAIMANT BRITISH TRANSPORT COMMISSION—Filed May 13, 1954

To: Messrs. Baird, White & Lanning, National Bank of Commerce Building, Norfolk, Virginia; Edwin Longcope, Esq., Messrs. McNutt & Nash, 84 William Street, New York 38, New York, Proctors for claimant, British Transport Commission.

1. Please take notice that the petitioner, United States of America, hereby requests the claimant, British Transport Commission, pursuant to Rule 32(b) of the Rules of Practice in Admiralty and Maritime Cases, to admit within ten days after service of this request, for the purpose of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the genuineness of the following documents, copies of which are annexed hereto:

(a) Sections 1, 2 and 3 of the British Transport Commission Act of 1947, 10 and 11 Geo. VI, ch. 49.

(b) Scheme of delegation of functions by the British Transport Commission to the Railway Executive, approved by the Minister of Transport, 25 November, 1947, as published in Butterworth's Annotated Legislation Service.

[fol. 431a] (c) Letter dated April 28, 1954 from the Chief, Admiralty and Shipping Section, Department of Justice, to the Editor of Lloyd's List and Shipping Gazette.

(d) Reply dated May 6, 1954 from the Editor, Lloyd's List and Shipping Gazette, to the Chief, Admiralty and Shipping Section, Department of Justice.

2. Your petitioner further requests plaintiff, pursuant to said Rule 32(b), to admit the truth of the statement made

in the letter from the Editor of Lloyd's List and Shipping Gazette dated May 6, 1954.

L. S. Parsons, Jr., United States Attorney.

Dated: Norfolk, Virginia, May 13, 1954.

Certificate of service (omitted in printing).

[fols. 432-433] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

REQUEST FOR ADMISSION DIRECTED TO CLAIMANT BRITISH TRANSPORT COMMISSION—Filed May 18, 1954

To: Messrs. Baird, White & Lanning, National Bank of Commerce Building, Norfolk, Virginia; Edwin Longcope, Esq., Messrs. McNutt & Nash, 84 William Street, New York 38, New York, Proctors for claimant, British Transport Commission.

Please take notice that the petitioner, United States of America, hereby requests the claimant, British Transport Commission, pursuant to Rule 32(b) of the Rules of Practice in Admiralty and Maritime Cases, to admit within ten days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the genuineness of the following document, a copy of which is annexed hereto:

Statutory Instruments 1953 No. 1291, issued by the Ministry of Transport 19th August, 1953, entitled The British Transport Commission (Executives) Order, 1953.

L. S. Parsons, Jr., United States Attorney.

Dated: Norfolk, Virginia, May 18, 1954.

Certificate of service (omitted in printing).

[fol. 434] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

STATEMENT OF CLAIMANT, BRITISH TRANSPORT COMMISSION, IN RESPONSE TO PETITIONER'S REQUESTS FOR ADMISSION UNDER ADMIRALTY RULE 32B, DATED MAY 13, 1954 AND MAY 18, 1954—FILED MAY 24, 1954

Claimant, British Transport Commission, by Edwin Longcope, its proctor, makes the following statement in response to Petitioner's request for admission pursuant to Rule 32B.

1. With respect to items 1 (a) and (b) in the request dated May 13, 1954, this claimant admits the same.

2. With respect to items 1 (c) and (d) of the request dated May 13, 1954, this claimant can neither admit nor deny the genuineness of these letters therein mentioned, inasmuch as it did not write the same. For the same reason claimant avers that it can not be compelled to admit the genuineness of the same and that their genuineness, if material, is subject to the normal mode of proof.

3. With respect to the truth of the statement made in the letter from the editor of Lloyd's List & Shipping Gazette dated May 6, 1954, there again this claimant is unable to either admit or deny the accuracy of such information, but considers that the said letter is not relevant to petitioner's motion to discovery inasmuch as whatever inquiry may have been conducted by the British Ministry of Transport a report thereof is not within the possession, custody or control of this claimant and hence not subject to discovery. This claimant is not a governmental agency and has no connection with the said Ministry. Any request for report of any inquiry conducted by the said Ministry should be addressed to it and not to the claimant.

[fols. 435-436] 4. This claimant admits the genuineness of the document referred to in Petitioner's request for admission dated May 18, 1954.

5. This statement is made by the undersigned as proctor for the claimant British Transport Commission, inasmuch as the latter has no officer or agent within this country.

Edwin Longcope, Baird, White & Lanning, Proctors,
By Guilford D. Ware.

Duly sworn to by Edwin Longcope. Jurat omitted in printing.

Certificate of service (omitted in printing).

[fol. 437] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

SUPPPLEMENTAL AFFIDAVIT IN OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY UNDER SUPREME COURT ADMIRALTY RULE 32—Filed May 26, 1954

STATE OF NEW YORK,
County of New York, ss.:

EDWIN LONGCOPE, being duly sworn, deposes and says:

That he is Proctor for British Transport Commission, a claimant herein, as owner of the cross-channel passenger steamer DUKE OF YORK, with respect to damages sustained by the DUKE OF YORK, with respect to damages sustained by the DUKE OF YORK as the result of a collision with the Naval Transport HAITI VICTORY, a United States public vessel, on May 6, 1953; that the following statements are made upon information received from the British Transport Commission and other sources; and that the statements made are, to the best of his knowledge, information and belief, correct.

[fol. 438] 1. The petitioner avers in its answer to the claim of the British Transport Commission that at the time

of this collision and to date there existed between the Government of the United Kingdom of Great Britain and Northern Ireland and the petitioner an Executive Agreement signed at London on December 4, 1942, pursuant to which "any and all claims on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland or any governmental agency owning and operating the DUKE OF YORK were waived as against the United States, and pursuant to Article Second of that Agreement the claim is to be asserted in limitation proceedings for the purpose of marshalling but not for payment." Petitioner avers, further, that although called upon to do so, "the public authority owning and operating the DUKE OF YORK has failed and refused and has contended and does still contend that its operations and its vessels are outside the scope of the Agreement."

The petitioner, in its answer, prays "that evidence be taken on the application of said Executive Agreement to the facts of the case and the said Agreement applied."

In the light of this contention by the petitioner in its answer, it is quite evident that petitioner seeks by praying for discovery of Items 12 and 13, to secure a determination by this Court in an indirect way that this so-called "Knock-for-Knock Agreement" is applicable to this situation. Should discovery be granted of these items, which affiant understands do not exist in fact, then no doubt the petitioner will use such discovery order, which would necessarily entail a finding that the British Transport Commission is an arm of the British Government, as a ruling, in effect, that the Knock-for-Knock Agreement is applicable.

[fol. 439] This Knock-for-Knock Agreement may be found printed in 1943 A. M. C., at page 133. The provisions which this claimant deems material are set forth in its brief in partial opposition to the petitioner's motion.

It is to be noted that pursuant thereto each contracting Government *agrees* to waive, *inter alia*, all claims arising out of or in connection with negligent navigation in respect of any vessing (including naval vessel) owned by such other Government where such other Government represents that such claim if made would ultimately be borne by such other Government. It is not self-operative to effect a waiver merely because one of the contracting Governments invokes

it. It requires the agreement of *both* Governments, acting through their interested departments or agencies, that the particular claim properly falls within the Agreement. If they so agree, then the waiver is effected by the execution of a Waiver Certificate. The application of or interpretation of this Agreement was never intended to be a matter for judicial interpretation or review. These are matters solely for administrative settlement.

This was recognized by the Department of Justice when a letter dated July 21, 1953, was addressed by them to the British Treasury Solicitor, asking him to intervene in these proceedings on the ground that the British Government might be involved. A photostatic copy of a copy of the reply thereto by the British Treasury Solicitor is attached hereto, marked "Exhibit A".

It will be noted that the British Treasury Solicitor rejected this suggestion, with the statement:

> "I should like to stress that the British Transport Commission are certainly not a Government Department and the DUKE OF YORK is not what is known in America as a public ship and no question of [fol. 440] waiver arises."

This ends the matter.

2. The affidavit annexed to the petitioner's motion avers that the material facts necessary to the proper disposition of the case "which your affiant has not been able to obtain by any public investigation of the kind which would normally occur "are with respect to

> (a). The speed at which the DUKE OF YORK was proceeding in the fog.
>
> (b). Whether the DUKE OF YORK had a bow lookout.
>
> (c). Whether the DUKE OF YORK was proceeding in a fog relying upon a defective radar."

This affidavit avers further that the "basic information sought is necessary to the preparation of the proofs by the HAITI VICTORY; cannot be obtained from any other source; must be obtained before the testimony can be adequately taken abroad; cannot be obtained abroad unless an order of discovery has been entered by this Court; and may be dispositive of the case."

This affiant avers that all of this information which may not be furnished to the petitioner by this claimant's consent to the discovery motion with respect to Items 1, 2 and 3, could have been obtained by the petitioner had it availed itself of the opportunity afforded its representatives at the Adjourned Coroner's Inquest held at Harwich, England, on January 6, 1954.

The Notes of Proceeding, a copy of which is in affiant's possession and will be furnished to the Court if it so de-
[fol. 441] sires, shows that among those present were Commander Charles Timblin (United States Navy) appearing as an observer for the United States Navy, and Mr. Walker, appearing as an observer on behalf of the United States Army.

In response to a request by the Coroner to have the names of any gentlemen representing any of the interested parties these gentlemen replied as follows:

> "Commander Timblin: I am really not representing anyone; I am appearing as an observer for the United States Navy. My name is Charles Timblin.
>
> Mr. Walker: My name is Walker and I am an interested observer on behalf of the personal representatives of May Margaret Ansdell."

Among the witnesses called were Roland Vincent Adams, Master of the DUKE OF YORK, and William Frank Bramhill, Second Officer of the DUKE OF YORK, who was in charge of the deck watch at the time of this collision.

At the conclusion of Captain Adams' testimony, the Coroner asked both Commander Timblin and Mr. Walker if they had any questions. Both replied: "No, Sir."

Mr. Bramhill was then called and examined. He was followed by George Henry Wilding, the Ship's Purser on the DUKE OF YORK. That Commander Timblin and Mr. Walker recognized that they were afforded an opportunity to examine the witnesses appears from the following colloquy that took place when the Coroner asked if there were any questions, at the conclusion of Mr. Wilding's examination:

> [fol. 442] "Commander Timblin: If I may I should like to make my position clear since I am being af-

forded an opportunity to question these people. I am just attending as an observer. There are questions which I should very much like to have asked the last two witnesses but I am not going to; I am just observing for the Navy.

The Coroner: I quite understand but if something does occur to you you have only to ask me.

Commander Timblin: Something has occurred to me very much but I do not think I should ask questions since I am just an observer.

The Coroner: I will not include you in the rota of people to ask questions.

Commander Timblin: I would appreciate it if you did not."

Having had the opportunity to examine the Master and the Second Officer at the Adjourned Coroner's Inquest, but having failed to avail itself of that opportunity, affiant submits that petitioner can show no good cause for the discovery of Item 14, and/or of Items 12 and 13, even if existing in fact.

This is particularly true in view of the fact that the Coroner announced at this adjourned inquest that the reason for the adjournment was to take advantage of the findings of the public hearing, which is usually held, thus saving the time of a lot of busy people, but that he had been notified that the decision had been reached "not to hold an Inquiry at all".

Edwin Longcope.

Subscribed and Sworn to before me this 24 day of May, 1954. Lucy C. Paganelli, Notary Public.

[fols. 443-566] EXHIBIT "A" TO SUPPLEMENTAL AFFIDAVIT

Copy

Storey's Gate, St. James's Park, London, S. W. 1
The Treasury Solicitor A. H. K. Your ref:

WEB:TFMcG 61-18511

28th July, 1953.

Air Mail

HAITI VICTORY—DUKE OF YORK
Collision May 6th, 1953

Dear Sir,

I duly received your letter of the 21st July and the enclosures.

I understand that you wish me to intervene in the limitation proceedings on the ground that the British Government may be involved. I regret, however, that I cannot possibly do this because I have no instructions that any Government Department are interested in the case.

Presumably, the British Transport Commission will enter an Appearance in the limitation proceedings should they wish to do so.

I should like to stress that the British Transport Commission are certainly not a Government Department and the DUKE OF YORK is not what is known in America as a public ship and no question of waiver arises.

The British Transport Commission is the Public Authority constituted in accordance with our Transport Act, 1947. Any surpluses of the Commission are not payable to Her Majesty's Government, nor does her Majesty's Government have to meet any deficiencies which the Commission may incur nor is Her Majesty's Government responsible for the debts of the Commission, save in so far as the Commission's stock or temporary borrowings may be guaranteed by the Treasury in accordance with the relevant provisions (primarily Section 90) of the Transportation Act, 1947.

The status of the British Transport Commission was discussed in the case of Tamlin v. Hannaford 1950 1 King's Bench Reports page 18. The case came before our Court

of Appeal and the following is an extract from the Judgment:

> "In the eye of the law the Corporation (the British Transport Commission) is its own master and is answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not Civil Servants and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes but it is not a Government Department nor do its powers fall within the province of government."

The only other thing I might add is that litigation and claims proceed between the British Transport Commission and the Government Departments whom I represent, just as they do between private individuals and the Departments.

In the circumstances I think you will appreciate I cannot intervene in this matter.

Yours faithfully, /s/ A. H. Kent, Assistant Treasury Solicitor.

The Attorney General, United States, Dept. of Justice, Washington 25, D. C., U. S. A.

[fol. 567] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

MEMORANDUM ON PETITIONER'S MOTION FOR DISCOVERY UNDER ADMIRALTY RULE 32—July 2, 1954

On the argument of this motion it appeared that the only items remaining in controversy were the statements made by certain crew members and other employees of the British Transport Commission at a preliminary inquiry con-

ducted by the British Ministry of Transport or one of its subordinate bodies. At bar the United States conceded that it would be satisfied with the production of the statements of those persons, without disclosure of any other part of the inquiry. Counsel for the British Transport Commission stated that his client had endeavored to obtain the statements, that the Ministry was willing to release them upon, but only upon, the direction of the declarants, and that the latter had declined to give their consent to the release. However, he assured the Court that these persons would be tendered for examination at the trial.

[fol. 568] The Court is of the opinion that, pursuant to Admiralty Rule 32, the Transport Commission should now be directed to produce the employees' statements, even though they be in the possession of the Ministry of Transport. Arguendo we may concede, as its counsel argues, that the Commission is not the Crown—it cannot bind the Crown, it has not the privileges and immunities of the Crown, its property is not Crown property, and, in short, it is not a political arm of that Government. But we are not concerned with the legal status of the Commission or of its property, or at this stage with the British-American Knock-for-Knock agreement mentioned by the Commission's proctor. The bald fact is that the British government—the Ministry of Transport—operates the Harwich ferry and for this purpose adopts the immediate agency of the Commission. Accordingly it must take the burdens of that operation with its benefits. When it thus empowers the Commission to perform the operation, the Ministry cannot complain if the Commission is held to the production of material pertaining to a particular incident of such operation, which the Commission is here litigating, though the data be in the possession of the Ministry and not in the custody of the Commission. To put it differently, the Commission cannot be excused from obedience to a discovery order, relating to its agency-operation, just because its principal refuses to permit it to do so. Obviously the order cannot be questioned as one directed at a suit-immune sovereign power, for the order does not run to the British government.

[fol. 569] Moreover, good cause has been shown for the

order. The requested statements are most valuable both as informative of the details of the accident and as checks upon the testimony of the declarants. These witnesses are not readily available in advance to the United States. They are British subjects, resident in England, and have an allegiance to the Commission as past or present employees —circumstances scarcely suggesting either easy access to, or free expression by, the witnesses at this time.

Let an appropriate order be presented.

Albert V. Bryan, United States District Judge.

Alexandria, Virginia, July 2nd, 1954.

[fol. 570] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

MEMORANDUM ON RIGHT OF CERTAIN CLAIMANTS TO IMPLEAD A CO-CLAIMANT UNDER RULE 56—July 2, 1954

Following the collision of the USNS HAITI VICTORY with the SS DUKE OF YORK in the North Sea, the United States filed here a petition for exoneration from or limitation of liability. British Transport Commission, the owner of the DUKE OF YORK, has filed a claim for the collision damage to that vessel. Other claimants, including the personal representatives of passengers killed in the collision, seek to implead, under Admiralty Rule 56, the British Transport Commission as an additional party defendant to their claims against the United States, laying contributive negligence to the DUKE OF YORK. The Commission excepts to the impleader.

The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty [fols. 571-574] Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. Hartford Accident Co. v. Sou. Pacific (1926) 273 U. S. 207; Just v. Chambers

(1941) 312 U. S. 383, 386. No case has permitted the impleading of one co-claimant by another. In The Clio-The Springhill, 1948 A. M. C. 75-77, Judge Knox permitted the original petitioner to implead a third-party defendant, but the latter was a claimant in the concourse, and the impleader was simply a counter or otherwise defensive move of the petitioner in respect to that claim.

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary entrance. Department of Highway v. Jahncke Service (1949) 5 Cir. 174 F. 2d 894 sustains this position. Although the impleaded party was not already in the cause, the same principle there enforced governs here.

Denial of the instant motion will be based upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other.

Albert V. Bryan, United States District Judge.

Alexandria, Virginia, July 2nd, 1954.

[fol. 575] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

[Title omitted]

PRE-TRIAL ORDER—July 12, 1954

The above case having come on for a hearing at Newport News, Virginia, on June 1, 1954, it is hereby

Ordered:

(1) That the trial of the liabilities of the case be set to commence at the United States Courthouse at Newport News, Virginia, on September 20, 1954, at 10:00 o'clock,

Eastern Standard Time, and that all persons desiring to contest the liabilities of the two vessels be summoned to appear at that hearing if they wish to be heard on that issue:

(2) That the hearing commencing on September 20 will be restricted to the issues of the asserted liabilities of the two vessels, DUKE OF YORK and HAITI VICTORY, for the collision; the asserted right of the owners of the HAITI VICTORY to the benefits of the limitation of liability statutes; and the valuation of the HAITI VICTORY for purposes of limitation of liability; and the said hearing will in no way involve proof of the claims for personal injury, death, or for loss of baggage, all of which are to await subsequent hearing after the liabilities and the limitation issues have been decided.

(3) That copies of this order will be circulated by the petitioner, together with the list of claims required by Admiralty Rule 52, to all persons who have filed claims in this proceeding; and that the attention of claimants who have not employed counsel resident in the Eastern District of Virginia, or who have not provided the local address of some person on whom notice may be served, is directed to the provisions of Rule 9(5) of this Court's Rules, which is set forth below.

Albert V. Bryan, U. S. District Judge.

Dated: July 12th, 1954, U. S. District Court for the Eastern District of Virginia.

[fol. 576] E. D. Va. R. 9- "5. A practitioner from another State or the District of Columbia may also be permitted to appear in and conduct specific cases in association with a duly qualified member of the bar of this court, if the rules of the Federal courts of the District in which he maintains an office extend a similar privilege to attorneys of this district. But, except where a party conducts his own case, no pleading or notice required to be signed by counsel shall be accepted by the clerk unless signed by an attorney who shall have been admitted to practice in this court, who shall be a resident of and maintain an office in this State, who shall have entered his appearance

of record in the case, with the address in the State where notice can be served upon him, and who shall have such authority that the court can deal with him alone in all matters connected with the case. This appearance shall not be withdrawn without leave of the court. Service of notice or other proceedings on him shall be equivalent to service on the parties for whom he appeared. Where a party is conducting his own case he shall file with his pleading a memorandum of one address within the district where notice can be served."

No objection as to form:

Baird, White & Lanning by —— —— Baird, National Bank of Commerce Building, Norfolk, Virginia, and McNutt & Nash, 84 William Street, New York 38, New York, Proctors for the claimant, British Transport Commission.

Roger E. Brooks, 923 - 20th Street, N. W., Washington, D. C., Proctor for claimants.

C. Lydon Harrell, Jr., Dickson Building, Norfolk, Virginia, Proctor for claimants.

Hughes, Little & Seawell, 936 Wainwright Building, Norfolk, Virginia, Proctors for claimants.

R. Arthur Jett, Jett, Sykes & Howell, 701 Citizens Bank Building, Norfolk 10, Virginia, Proctors for claimants.

John W. Oast, Jr. and Messrs. Dow & Symmers, Citizens Bank Building, Norfolk 10, Virginia, Proctors for claimants.

John P. Parrish, 111 South Fairfax, Alexandria, Virginia, Proctor for claimants.

[fols. 557-1356] Vandeventer, Black & Meredith, Citizens Bank Building, Norfolk 10, Virginia, Proctors for claimants.

Earl W. White, Dean Building, Norfolk, Virginia, Proctors for claimants.

[fol. 1357] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

ORDER REOPENING MEMORANDUM OF COURT, ETC.—November 2, 1954

Petitioner having heretofore filed herein its motion for discovery from the claimant British Transport Commission of, inter alia, certain statements or depositions given to the Ministry of Transport of the Government of the United Kingdom of Great Britian and Northern Ireland on or about May 13, 1953 by the following named witnesses on the DUKE OF YORK:

Rowland Vincent Adams
Frank Brown Allen
William Frank Bramhill
Norman Wyles Roberts
Frederick John Bourne
Malcolm Alistair Ottley
Herbert Ernest Saunders;

and hearing having been had before this Court on June 1, 1954 upon the aforesaid motion of petitioner, and the Court having thereafter, on July 2, 1954, filed herein its memorandum holding that "the British Government—the Ministry of Transport—operates the Harwich Ferry and for this purpose adopts the immediate agency of the [fol. 1358] Commission", and entered its order that the claimant, British Transport Commission, be, therefore, required to produce and make available to petitioner for inspection and copying the statements or depositions given to the Ministry of Transport by the witnesses aforenamed, and prior to the trial of this cause copies of the said statements or depositions having been voluntarily made available by the British Government to petitioner herein and to all other parties:

Proctors for the claimant thereupon advised the Court that the question of whether the British Transport Com-

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mission was an agency of the British Government may later become a critical issue in this cause or in other proceedings involving the claim of the said Commission asserted in this suit, and because the question could then be presented more fully than was possible on said discovery proceedings, they desired to have any decision thereof deferred until that time, and to this end the said proctors moved the Court to reopen its decision of said question and rehear the said issue.

Upon consideration whereof, it appearing that the production of said papers as aforesaid has satisfied the aim and purpose of said order and the Court being willing to hear further argument and exposition of said question, it is

Ordered that the aforesaid memorandum of this Court, [fols. 1359-1404] filed herein on July 12, 1954, insofar as it held that claimant British Transport Commission was the agent of the British Government and its Ministry of Transport in the operation of the DUKE OF YORK, is hereby reopened, the issue to be reheard as and when it may again arise.

Albert V. Bryon, United States District Judge.

Alexandria, Virginia. November 2nd, 1954.

[fol. 1405] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

AMENDED IMPLEADING PETITION ON BEHALF OF JULIET ROBESON CHAMBERLAIN UNDER SUPREME COURT ADMIRALTY RULE NO. 56—Filed March 31, 1955

The amended impleading petition of Juliet Robeson Chamberlain against the British Transport Commission filed pursuant to United States Supreme Court Admiralty Rule No. 56 of the Rules of Practice in Admiralty and

Maritime Cases, alleges, on information and belief, as follows:

First: This petitioner herein and hereby adopts all allegations of her impleading petition under Supreme Court Admiralty Rule No. 56 heretofore filed herein on or about May 1, 1954, to the same extent as if the same were again herein repeated in words and figures, with the exception of paragraph numbered "Seventh" of her said impleading petition under Supreme Court Admiralty Rule No. 56; which is hereby amended to read:

"Seventh: By reason of the foregoing collision petitioner has been caused to suffer damages in the sum of Fifty Thousand ($50,000.00) Dollars for injuries, loss of time, medical and other expenses, and the further sum of Five Hundred ($500.00) Dollars for loss of baggage and personal effects, no part of which has been paid, although duly demanded."

Juliet Robeson Chamberlain, By: R. Arthur Jett, of Proctors for Petitioner.

Jett, Sykes & Howell, Proctors for Juliet Robeson Chamberlain, 701 Citizens Bank Building, Norfolk 10, Virginia.

[fols. 1406-1410] *Duly sworn to by R. Arthur Jett. Jurat omitted in printing.*

[fol. 1411] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

MEMORANDUM BY THE COURT—May 5, 1955

Just before dawn in the North Sea on May 6, 1953, the USNS HAITI VICTORY, headed for Bremerhaven, and the westbound S. S. DUKE OF YORK, an overnight ferry between

the Hook of Holland and Harwich, England, collided. The DUKE OF YORK had just emerged from a fog; the HAITI VICTORY was running in clear weather. Minor damage was suffered by the HAITI VICTORY, but her stem so deeply knifed into the port side of the DUKE OF YORK, just forward of her bridge, that the entire bow of the latter fell off and sank. Several of her 437 passengers were killed, others injured, and a large number lost their personal baggage. As owner of the HAITI VICTORY, the United States of America has filed a petition for exoneration from or limitation of liability. The question is whether either or both vessels failed to observe the care and caution enjoined upon mariners, by seamanship and statute, for the prevention of collisions at sea.

Asking $1,500,000 for her damage, the British Transport Commission, operating the DUKE OF YORK in connection with the British railway system, has led in the effort of [fol. 1412] the claimants to lay responsibility for the accident to the HAITI VICTORY. Petitioner's right to limitation, as well as the limitation fund of $1,039,959.52, has been established without contest. Certain claimants sought, through impleading petitions, to assert and try in this proceeding the liability of the British Transport Commission to them; the attempts were rejected and the immunity of the Commission thereto in the present forum was sustained. Ascertainment of the quantum of damages has been deferred in each instance to the determination of liability.

The DUKE OF YORK, a twin screw steam turbine oil burner, 339 feet in length, left the Hook of Holland bound for Harwich a few minutes after midnight May 5, 1953 (early morning of May 6). She had a maximum speed of 18-20 knots and the crossing was normally a matter of five hours. Her lane was slightly south of due west—W.1/4 S., 267° magnetic—and took her about a mile south of Galloper Lightship, located off the English coast some distance north of the Thames' mouth. The Hook and Harwich are nearly on the same parallel, a little below the 52nd N. The DUKE was showing all required navigation lights—two steaming lights forward, masthead and mainmast, a stern light, and red and green side running lights. Her equipment included radar, but the instrument failed before the ship was twenty

minutes out. In addition to her regular officer complement, she carried a Dutch pilot all the way across.

The HAITI VICTORY is a single-screw propeller, of the Victory ship type, 439 feet in length and equipped with radar. She took on a licensed British pilot at Dover just after 0117 British Summer Time, which was one hour ahead of Greenwich Mean Time and is the time of the [fol. 1413] references herein. Up to Galloper Lightship her course was generally 022° at first, and then 024°, gyro. Passing on her port hand the South and East Goodwin Lightships enroute, she came abeam of Galloper at about 0414 BST. After an alteration of her course to 050° gyro, to go under the stern of a crossing vessel, when 1½ miles to the east of Galloper, the HAITI VICTORY settled on a firm course of 036° gyro. She was maintaining her maximum speed, 17-18 knots, and was showing all requisite lights.

The HAITI VICTORY's first notice of the DUKE's presence was the latter's fog whistle just after 0414 hours. It was caught by the HAITI VICTORY's forward lookout, and immediately reported to the bridge, as being off the starboard bow. Her pilot had heard it too. Instantly he passed to the starboard door of the wheelhouse, scanned the darkness from bow to beam, saw nothing and went directly to the radar. It disclosed a target on his starboard bow. Going again to the starboard wing of the bridge and again seeing nothing, he at once stopped his engines—0415 hours. Within a moment the red light of the DUKE appeared on his starboard bow but ½ mile off; thereupon the HAITI's rudder was put Hard Right, her engines Full Astern, and her whistle given a short blast. At 0416 the ships were together.

Aboard the DUKE, the captain heard a whistle four or five points on her port bow—the blast of the HAITI as she went Right Rudder and Full Astern. About the same time his forecastle-head lookout shouted his observation of the HAITI's masthead light, as well as her green light, ¼ mile away, about 6 points on the port bow. While taking a "fix". [fol. 1414] from the Decca dials in the wheelhouse, the DUKE's second mate heard the lookout's call, and running out on the port wing picked out the HAITI's green light with his binoculars, his radar being inoperable. At once the master put the DUKE's engines on Slow, manually

sounded a prolonged blast on her whistle, and followed it with Full Astern and 3 short blasts. Collision ensued.

The collision was two miles east of Galloper. The prow of the HAITI VICTORY penetrated the port bow of the DUKE OF YORK on the foreside of her bridge. The HAITI VICTORY puts the time at 0416, the YORK at 0418 hours. No fault is found in the engine or wheel movements of either vessel after they become aware of each other. Agony of collision was upon them and avoidance was then impossible. Existence or absence of earlier fault becomes a question of whether for the weather then prevailing the conduct of either vessel constituted negligence in navigation; therefore, the primary and crucial inquiry is what was the weather as known, or as it ought to have been known, to the two navigators.

A meteorological cold front was moving over the North Sea, from northeast to southwest, on the very early morning of the collision, May 6, 1953. It seemed to be pivoting on a point to the north of the east coast of England. By illustration, at midnight, GMT, along the English coast the weather was favorable, and was as favorable along the European coast as far north as the Hook of Holland; from midnight until 4 o'clock A. M. BST it moved southwardly 60 miles along the Dutch coast, but only 20 to 30 miles along the English shore. As a "weak" front it in- [fol. 1415] cluded only drizzle, overcast and fog with very poor visibility. At 4 o'clock BST it was still 60 miles northeast of Galloper, but twice as far down the European coast as on the opposite coast. From 4 o'clock until 7, it was almost stationary on the English side, leaving fair visibility there, but the night was dark. In and around Galloper the weather at 0300 hours was "cloudy with wet dew", meaning on Galloper's log legend that the moon or stars would be visible at times. Fog signals were not commenced by Galloper until 0445 (the collision was at 0416 or 0418) and not until 0600 was it overcast and misty at Galloper. "Misty . . . is not quite as thick as [fog] but enough to cause objects to be indistinct and to require the fog signal to be sounded." The frequency of the fog and the low visibility increased from Galloper toward the Dutch coast.

From the time the DUKE left the gas buoy, the first sea

point, off the Hook of Holland, she met fog. As early as 12:45 A. M., less than an hour after leaving the docking pier, her captain was called to the bridge on account of the fog. At Noord Hinder Lightship, off the Dutch coast and 9 miles south of the DUKE's track, the log records the weather as foggy from one A. M. to five. The DUKE was running through a "patchy" fog—"very thick at times" and then fairly clear intervals. She was piercing one fog bank after another. Fog signals from the vessel's steam whistle were sounded continually. From 3 A. M. on, the fog was "very thick". This is the testimony of the DUKE's crew. The fog pocket she transited immediately before the collision was apparently the westernmost in her course.

[fol. 1416] In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the "moderate speed" injunction in the fog rules of Article 16, International Rules, 33 USCA 145n. It was an overriding and major fault; collision was a foreseeable result. Enveloped repeatedly throughout her passage in a fog that severely cut visibility, and rendered her invisible, she nevertheless assumed and kept to her clear weather speed —she reached Galloper at her regularly scheduled hour. When on the bridge at 12:45 A. M., the captain reduced the engines to Half Speed, 12 knots, but within a few minutes he put them back on Full Speed, 18 knots, and returned to his cabin, evidently satisfied with the visibility. Never was visibility greater than 1 or 2 miles. From 0053 until 0325 hours her engines were at Full Speed Ahead. Twenty-four miles east of Galloper, 0325, visibility was shorter than a mile; by 0412, six minutes before the collision, it was less than half a mile; but during this period, save for a minute, her speed was 16 knots, Standby Full Ahead. At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots.

Obviously, too, the DUKE was not conforming to the authoritative interpretation of Article 16—that speed in a fog shall not exceed a rate that would allow her, with the

assistance of her engines, to come to a standstill before she would collide with another vessel that she should see. The Laurence, 1893, 4 cir. 54 F. 542, 544; The Silver Palm, 1937, 9 cir. 94 F. 2d 754, 757; Griffin on Collision, p. 292 et seq.; The Fjell, 1949, E. D. Va. 257 F. 478, 480, opinion [fol. 1417] by Judge Waddill. Indeed, she could not stop in time to allow the bow watch to get below to warn his companions. That 12 knots in a fog of ¼ mile visibility is in fact an immoderate speed seems manifest; that it is so in law is well precedented. Griffin on Collisions, p. 301, footnote 1.

As to fault in the HAITI VICTORY, decision depends on whether she knew or ought to have known that she was running into or alongside a fog bank. If she had such knowledge, actual or attributable, and if the fog rules bind a vessel approaching or running alongside a fog, she was at fault; for she was proceeding at full speed, 17-18 knots, and was taking no fog precautions. But the Court finds that she was neither in a fog nor chargeable with notice of the nearby fog patch. It cannot be successfully argued that, with the DUKE so near, the HAITI VICTORY must necessarily have been aware of the fog enshrouding the DUKE. The evidence denies any such deduction. The fog cloaking the DUKE hid her as effectively as it hindered her; and all the while remained imperceptible to the outsider.

As the HAITI left Dover, visibility was excellent, so clear that the radar was soon switched off. Lights were distinct on both sides of the Channel, ahead and astern. One vessel was overtaken on the way, readily discernible. At 0400, Galloper was easily picked up one point on the port bow. Just before the HAITI came abeam of Galloper, still another vessel was seen, running from Goegree Lightship, on the Holland coast and a little south of the Hook, to Harwich. The HAITI VICTORY altered her course to 050 to give way to the crossing vessel, went around her stern, and [fol. 1418] resumed her plotted course on 036. The crossing vessel, as indicated, came from the east, the very direction from which the DUKE was coming. She was plainly seen when as much as 4 or 5 miles eastward. This was at 0414 hours—2 minutes before the collision. A trawler a mile and a half north of the DUKE, and on a

parallel course, showed no consciousness of any fog. As we have seen, even Galloper did not find it advisable to issue fog signals until 0445, and then it did so not for fog, only for "Cloudy Wet dew." Signs of fog were not seen by the HAITI VICTORY until after the DUKE revealed herself. They were not overlooked; they were not there.

To charge the HAITI VICTORY with knowledge of the proximity of fog, the DUKE called to the stand the mate of the S. S. AMERICAN, a ship following the HAITI VICTORY up the North Sea. Her course was 034° True. Departing Dover seventeen minutes after the HAITI VICTORY, the mate said he was able at 0425 to see, 8½ miles on his "port head", the Kentish Knock Light located on the English coast; he stated the visibility was 10 miles. His log contains no entry of bad weather between 0236 and 0441. His notation of fog at 0441 corresponds to Galloper's log of fog signals at 0445; but AMERICAN's record reveals that fog was only setting in at 0441, that not until then were her engines put on Standby, and only at 0450 was her speed reduced because of fog. He states he could not see Galloper until within ½ mile of it at 0506, but his log notes that the AMERICAN came abeam of Galloper at 0508 with 3 miles visibility. Hence, he gives no proof of fog perception on the English coast as early as 0416 or 0418—[fol. 1419] collision times. When 1½ miles passed Galloper, 0512, he saw the DUKE and the HAITI lying alongside each other fore and aft.

True, the HAITI VICTORY's master did not completely undress on turning in, staying ready for any call, including a fog alarm. He testified, too, of the frequency of fogs in the North Sea. But, all of this discloses precaution against fog, not suspicion of it. Of course, he knew that ships traversed the North Sea between the English and Dutch ports; but he had the right to assume that their presence would be announced through the signals, and would be accompanied by the seamanship, demanded by the laws of the sea. Admittedly, as to the westbound traffic he was the burdened vessel, they the privileged; but again their paramount rights presuppose their observance of the law. Failing in this, their priority is forfeited. Specifically, compliance with the fog rule was a prerequisite to assertion of the righthand vessel's crossing privileges.

Strenuous insistence of fault in the HAITI VICTORY is urged for her failure to make use of radar, particularly, when the HAITI VICTORY's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the HAITI VICTORY, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the HAITI VICTORY was changing back from her passing course of 050° to the new course of 036°. He did not see the DUKE on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; [fol. 1420] he had no reason to go to the radar to search in any direction. His failure to see the DUKE was not negligence, for it was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it.

At this point it is well to refer to the DUKE's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the DUKE OF YORK's excessive speed was the predominant fault leading to the collision, it is not necessary in this case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence.

This memorandum is adopted by the Court as its findings of fact and conclusions of law. Within 10 days proctors for the United States will present a decree in accordance therewith, exonerating the petitioner, after submitting copies to the claimants' proctors for consideration as to form.

Albert V. Bryan, United States District Judge.

Alexandria, Virginia, May 5th, 1955.

[fol. 1421] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

ORDER DISMISSING ALL PETITIONS TO IMPLEAD BRITISH TRANSPORT COMMISSION, ETC.—May 12, 1955

William B. Eley, Administrator of the Estate of Dale M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen, and certain other claimants, having filed motions for leave to file petitions herein under the 56th Rule in Admiralty impleading a co-claimant, British Transport Commission, as owner of the SS DUKE OF YORK, and British Transport Commission having objected thereto on the ground that said claimants have no right to implead the said Commission herein;

And an order having been entered in this Court on May 3, 1954, reserving the objections of the British Transport Commission for hearing and determination, and ordering further that meanwhile, and subject to the further order of this Court, leave be granted to said claimants to file their petitions herein;

And this Court, after hearing the arguments of proctors, having filed a memorandum, dated July 2, 1954, [redacted], denying the motions upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other;

[fol. 1422] And Juliet R. Chamberlain having moved this Court to file an amended impleading petition against British Transport Commission, to which said Commission has objected upon the ground that said claimant has no right to implead the said Commission herein;

Now, on motion of McNutt & Nash, Esquires and Baird, White & Lanning, Esquires, proctors for the British Transport Commission, it is

Ordered:

1. That the petitions of William B. Eley, Administrator of the Estate of Dade M. Chaney, deceased, L. T. Seawell,

Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen and any and all other claimants herein who may have filed petitions to implead British Transport Commission under the 56th Rule in Admiralty pursuant to the order of this Court dated May 3, 1954, or otherwise, be and they are hereby dismissed, to which ruling each of said impleading petitioners excepted as did also the United States.

2. That the motion of Juliet R. Chamberlain to file an amended impleading petition be and it is hereby granted, but the said amended petition is now dismissed, to which ruling the said Juliet R. Chamberlain excepted.

Albert V. Bryan, United States District Judge.

Richmond, Va., May 12th, 1955.

[fol. 1423] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

Admiralty 7622

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

FINAL DECREE OF EXONERATION—June 2, 1955

The petition of the United States of America as owner of the USNS HAITI VICTORY for exoneration from and limitation of liability having come on for trial on the pleadings and proofs of the petitioner and of the said claimants and having been argued by the advocates of the respective parties;

And the Court having filed its decision that the collision and the loss, destruction, damage and injury arising therefrom were not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY, and that the petitioner was entitled to exoneration from liability, as appears by the opinion on file:

Now, on motion of L. S. Parsons, Jr., United States Attorney, proctor for the petitioner, it is

Ordered, adjudged and decreed,

That the collision described in the libel and petition was not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY;

And that said petitioner is entitled to exoneration from liability;

And that said petitioner be and hereby is forever exempted and discharged from all loss, damage, destruction [fols. 1424-1447] or injury arising from or growing out of the said collision.

Albert V. Bryan, U. S. District Judge.

Alexandria, Virginia. June 2, 1955.

No objection as to form.

Edwin Longcope, Baird, White & Lanning.

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Jett, Sykes and Howell.

Vandeventer, Black & Meredith.

John W. Oast, Jr.

David H. Batchelder, Jr.

Earl M. White.

C. Lydon Harrell, Jr.

Roger Brooks.

John P. Parrish.

[fol. 1448] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 12, 1955

The claimants, previously listed on the notice of appeal herein, hereby assign errors in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

First: The District Court erred in exonerating the USNS HAITI VICTORY and her owners from all liability for

damages due to the collision with the SS DUKE OF YORK.

Second: The District Court erred in holding that the USNS HAITI VICTORY was neither in fog or chargeable with notice of nearby fog just prior to collision.

Third: The District Court erred in holding that fog conditions were not observed and could not have been observed on the HAITI VICTORY prior to sighting the DUKE OF YORK.

Fourth: The District Court erred in holding that there was no negligence on the part of the HAITI VICTORY for failure to observe the DUKE OF YORK on the radar scope.

Fifth: The District Court erred in applying different standards of good seamanship to two vessels which collided in fog.

Sixth: The District Court erred in exonerating the HAITI VICTORY in spite of her failure to stop immediately on hearing a fog signal forward of the beam.

[fol. 1449] Seventh: The District Dourt erred in not holding the HAITI VICTORY liable for her failure to make prudent use of her radar throughout the voyage.

Eighth: The District Court erred in not holding that a vessel steaming at full speed on a dark overcast night, when the horizon is not discernible, assumes the risk of encountering a vessel obscured by heavier weather, and is under a duty to use her readily available radar.

Ninth: The District Court erred in denying to claimants their right to cross claim and implead the owners of the DUKE OF YORK.

David W. Batchelder, Proctor for Claimants, Citizens Bank Building, Norfolk, Virginia.

Dated: October 12, 1955. Norfolk, Virginia.

[fol. 1450] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

[Title omitted]

CROSS-ASSIGNMENT OF ERROR—Filed October 21, 1955

The petitioner herein hereby assigns error in the proceedings, decrees, orders, and decisions of the District Court in the above entitled action as follows:

First: The District Court erred in denying to claimants and to petitioner the right to cross-claim and implead the owners of the SS DUKE OF YORK.

L. S. Parsons, Jr., United States Attorney, Proctor for Petitioner.

Dated: October 21, 1955. Norfolk, Virginia.

Certificate of service (omitted in printing).

[fol. 1451] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION, *et al.*, Appellants,

versus

UNITED STATES OF AMERICA, as owner of the USNS HAITI VICTORY, petitioning for exoneration from or limitation of liability in a cause of limitation of liability, civil and maritime, Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk

In Admiralty

(Argued January 7, 1956. Decided February 13, 1956.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Edwin Longcope (Baird, White & Lanning; McNutt & Nash, and Edward R. Baird on brief) for Appellant, British Transport Commission; Wilbur E. Dow, Jr., (John W. Oast, Jr., David H. Batchelder, Jr.; Dow & Symmers; [fol. 1452] Vandeventer, Black & Meredith; Hughes, Little & Seawell; Jett, Sykes & Howell; C. Lydon Harrell, Jr., and Earl W. White on brief) for Appellants, Intervening Claimants; and Thomas F. McGovern, Attorney, Department of Justice, (L. S. Parsons, Jr., U. S. Attorney; Leavenworth Colby, Attorney, Department of Justice, and John M. Hollis, Assistant U. S. Attorney, on brief) for Appellee.

OPINION—February 13, 1956

DOBIE, Circuit Judge:

On May 6, 1953, in the very early morning, a collision occurred in the North Sea between the overnight ferry DUKE OF YORK (hereinafter called the DUKE) owned by the British Transport Commission (hereinafter called the Commission), and the transport HAITI VICTORY (herein-

after called the HAITI), owned by the United States. Terrific damage was done to the DUKE, several persons on the DUKE were killed, others were injured and many suffered property damage. The HAITI suffered only minor damages to her bow, amounting to some $60,040.48.

A petition was filed in the United States District Court for the Eastern District of Virginia by the United States, as owner of the HAITI, seeking exoneration from and/or limitation of liability for all losses and damages resulting from the collision. The Commission filed in these proceedings a claim of $1,500,000 for the losses and damages sustained by the DUKE. Numerous death, personal injury and baggage claimants also filed claims in the limitation proceedings, in varying amounts.

Some of the other claimants also filed petitions in the [fol. 1453] limitation proceedings, seeking to implead the Commission therein under General Admiralty Rule 56. In an unreported memorandum, the District Court held that the other claimants could not implead the Commission, for the reason that a limitation proceeding does not provide a forum for the adjudication of the liability of co-claimants to each other. Accordingly, an order was entered in the District Court dismissing the impleading petitions of these other claimants.

The limitation proceedings were tried in the District Court before Judge Albert V. Bryan. At the trial the right of petitioner, United States, to limit its liability, as well as the limitation fund of $1,039,959.52, was established without contest.

Thereafter, Judge Bryan filed his opinion, (131 F. Supp. 712) in which he held that the DUKE was solely to blame for the collision. The final decree exonerating the HAITI was filed in accordance with this opinion.

The Commission, and the other claimants, have filed appeals from the final decree exonerating the HAITI. The other claimants have also appealed from the order dismissing their petitions to implead the Commission in the government's limitation proceedings.

Two questions are before us on this appeal: (1) Did the District Court commit error in exonerating the HAITI and holding the DUKE solely to blame for the collision; and (2) Did the District Court commit error in dismissing the

petitions of the other claimants to implead the Commission in the limitation proceedings instituted by the United States seeking exoneration from, and/or limitation of liability for, losses and damages resulting from the collision.

[fol. 1454] The fault of the DUKE seems quite clear and is not seriously contested. She had left the Hook of Holland bound West for Harwich, England. We quote from the opinion of the District Judge, which finds ample support in the record, (131 F. Supp. 712, 715):

> "The DUKE was running through a 'patchy fog' —'very thick at times' and then fairly clear intervals. She was piercing one fog bank after another. * * * From 3 A. M. on, the fog was 'very thick.' * * * In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the 'moderate speed' injunction in the fog rules of Article 16, International Rules; 33 USCA § 145n. It was an overriding and major fault; collision was a foreseeable result. * * * * At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots."

Had the weather been clear and the visibility good all around, under the Starboard Hand Rule, the DUKE would have been the privileged, the HAITI the burdened, vessel. This rule, though, did not apply here by virtue of the fog surrounding the DUKE.

This brings us to the District Court's exoneration of the HAITI, a discussion involving at least three points: (a) Actual or constructive knowledge on the part of the HAITI that she was running into, or alongside, a fog bank; (2) The conduct of the HAITI after the HAITI heard the whistle of the DUKE; (3) The negligent use, or failure to use its [fol. 1455] radar by the HAITI. A careful study of the record convinces us that we cannot reverse the District Court's exoneration of the HAITI.

Visibility was excellent as the HAITI, with a Trinity

House pilot, left Dover, bound for Bremerhaven, Germany. Lights were distinct on both sides of the English Channel. Around 0400 Galloper Lightship was easily picked up by the HAITI, about one point on the port bow. A very short while before the HAITI came abeam of Galloper, a crossing vessel was seen by the HAITI, about 4 miles away. The HAITI altered her course to 050°, went around this vessel's stern and then resumed her plotted course of 036°. This happened about 0414, approximately 3 minutes before the collision, and this crossing vessel came from the East, the direction from which the DUKE was coming.

A trawler, about 1½ miles North of the DUKE, and on a course practically parallel to the DUKE, gave nothing to indicate the presence of fog. Galloper gave no fog signals until 0445, and then signalled only "Cloudy wet dew." The collision occurred about two miles East of Galloper. The mate of the S. S. AMERICAN, which left Dover 17 minutes after the HAITI, testified that his log contained no notation of fog until 0441.

Confirmatory testimony to the effect that there was no fog and no signs of impaired visibility apparent to those on the HAITI was given by her bow lookout, her helmsman and her mate. We must, therefore, affirm the holding of the District Court that the HAITI never knew, nor should have known, of the fog which enveloped the DUKE.

This brings us to the conduct of the HAITI just prior to [fol. 1456] the collision. The first notice those on the HAITI had of the presence of the DUKE was a single blast whistle from the DUKE. The bow lookout of the HAITI promptly reported to the bridge by telephone that he had heard what he thought was a ship's whistle of the HAITI's starboard bow. This whistle was also heard by the helmsman and pilot of the HAITI. The time, then, was apparently about 0414.

The pilot dashed out on the starboard side of the wheelhouse, looked around, saw nothing and went to the radar which disclosed an echo off the starboard bow. He again went out, saw nothing and stopped the engines, around 0415. Those on the HAITI thought the single blast they heard was a fog signal, but they were not sure of this.

Apparently in about a minute, the HAITI pilot saw the

DUKE crossing from starboard to port, gave the order hard right, blew one short blast and went full speed astern. The full speed astern was logged on the HAITI at 0415½, the collision at 0416. The HAITI changed course from 036° to 079° before striking the DUKE. The pilot of the HAITI testified that when he first saw the DUKE looming out of the fog, there was nothing that could be done by the HAITI beyond the hard right and full speed astern. A survey of the deformation of the plates, which is the resultant of the velocities of the ships, showed the speed of the DUKE, at the moment of impact, to be from 2 to 4 times the speed of the HAITI.

Under these facts, we must affirm the holding of the District Court exonerating the HAITI from blame in its conduct just before the collision. This includes the contention [fol. 1457] of the DUKE that the HAITI violated Rule 16 (33 USCA § 92):

"* * *

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

See, THE UMBRIA, 166 U. S. 404; *Johnston-Warren Lines* v. *United States*, 196 F. (2d) 689; *Steffens* v. *United States*, 32 F. (2d) 206; THE ANNA M. FAHY, 153 Fed. 866.

This brings us to the radar question. Since the visibility was good, the radar on the HAITI was switched off to stand by about two hours after the pilot boarded the HAITI. At stand by, no images are visible on the radar screen, but the radar is kept heated and, as the pilot testified, "When you do switch it, it comes on immediately." It was proved that the delicate cavity magnetron of the HAITI radar has a short life, so that the actual use of the radar must be carefully rationed.

Counsel for the DUKE make much of the failure of those on the HAITI to observe the DUKE when, for purely navigational purposes, the radar was switched on as the HAITI neared Galloper and the HAITI mate failed to find the DUKE

on the radar screen. On this point, we quote from the opinion of the District Judge, (131 F. Supp. 712, 717):

> "Strenuous insistence of fault in the Haiti Victory [fol. 1458] is urged for her failure to make use of radar, particularly, when the Haiti Victory's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the Haiti Victory, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the Haiti Victory was changing back from her passing course of 050° to the new course of 036°. He did not see the Duke on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the Duke was not negligence, for it was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it."

With this, we must concur. See, The Southport, 82 Ll. L. Rep. 862; *United States* v. The Australia Star, 172 F. (2d) 472, 476, cert. denied 338 U. S. 823; *Wood* v. *United States*, 125 F. Supp. 42, 51; *Pocahontas Steamship Co.* v. The Esso Aruba, 94 F. Supp. 486, aff'd. 197 F. (2d) 422; *Anglo-Saxon Petroleum Co.* v. *United States*, 88 F. Supp. 158; Wylie, Use of Radar at Sea (Institute of Navigation, London, 1953).

As to the defective radar on the Duke, the District Judge observed, (131 F. Supp. 712, 717):

> "At this point it is well to refer to the Duke's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was [fol. 1459] ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the Duke of York's excessive speed was the predominant

fault leading to the collision, it is not necessary in this case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence."

This brings us to the second question before us on this appeal: Did the District Court err in denying the petitions of various claimants to implead the co-claimant, British Transport Commission. This right of impleader is sought under the 56th. Admiralty Rule:

"In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; [fol. 1460] the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appel-

late court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

The District Judge stated:

"The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. * * *

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary entrance."

[fol. 1461] In his opinion, the District Judge cited, with the admission that none of these cases was precisely in point, *Just* v. *Chambers*, 312 U. S. 383, 386; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207; *Department of Highways* v. *Jahncke Service, Inc.*, 174 F. (2d) 894; The Clio-The Springhill, 1948 A. M. C. 75.

This appears to be a question of first impression. While there have been cases involving the right of a petitioner in a limitation of liability proceeding to implead a claimant therein and the right of a claimant or a petitioner to bring in a third party, there have been no cases that involve the precise issue here involved: Whether one co-claimant in a limitation of liability proceeding can implead another co-claimant under the provisions of the 56th. Admiralty Rule.

We advert briefly to the cases cited in the District Judge's opinion. In The Hartford Accident and Just cases, *supra*, the Supreme Court held that when the jurisdiction of the court of admiralty has attached through a petition for limitation, the jurisdiction to determine liability is not lost merely because the shipowner fails to

establish his right of limitation, and the claimants will be furnished a complete remedy by distribution of the *res* and by judgments *in personam* for deficiencies against the owner. In the Department of Highways case, *supra*, the impleading petition was denied, but, in that case, it was a third party that was sought to be impleaded rather than a co-claimant which was before the court and thus subject to the court's jurisdiction, as is the Commission in the instant case. In the Clio-Springhill case, *supra*, the impleading petition was granted, but the party seeking the impleading petition was the petitioner in the limitation of liability proceeding.

[fol. 1462] Though the question is close and not free from difficulty, we think the District Court erred in denying these impleading petitions, which should have been granted. While a hardship might thereby be suffered by the Commission, it would be an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings. Here we have many claimants from many parts of the world, who have filed their claims in the limitation proceedings instituted by the United States. All of the evidence concerning the collision involved herein has been presented both by petitioner and the claimant, British Transport Commission. The merits of the case have been adjudicated and it would work an undue hardship on all of the claimants herein not to have their rights against the British Transport Commission settled at this time. To hold otherwise would mean that the various claimants would have to pursue their causes of action against the Commission in another forum at great expense and at a time when perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time.

As a practical matter as well as an equitable one, the claimants herein should be allowed to implead the Commission. The Court (United States Court of Appeals, Second Circuit) in *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corporation*, 86 F. (2d) 708, stated that a determination in a limitation of liability proceeding will be *res adjudicata*. This position is also supported by The Adah, 258 Fed. 377, wherein the same court stated that all parties to a proceeding for limitation of liability

who appear voluntarily or otherwise and join issues with the petitioners and between themselves are bound by the decree. Thus, if the issue of liability in the instant case is *res adjudicata* and all the parties herein bound thereby, [fol. 1463] then the District Court should also decide the issue of damages as between all the parties before it and this could only be accomplished by the allowance of an impleading petition under the 56th. Admiralty Rule.

It has often been said that admiralty courts sit as courts of equity. Certainly wide acclaim has been lavished on the delight of equity in doing complete justice to all the parties before it and here the Commission was before the court. This view was admirably stated by Chief Justice Taft in the Hartford Accident case, 273 U. S. 207, 215-216:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. * * * The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a cerditor's bill. It looks to a complete and just disposition of a many-cornered controversy."

This equitable principle was stated and applied by the Supreme Court in the case of *Alexander v. Hillman*, 296 U. S. 222, which was an equity suit brought by receivers of a corporation for the purpose of winding up the affairs of the company and the disposition of its assets. Certain officers of the corporation, who were not served with process, appeared as respondents and presented their claims. The receiver of the company then filed various counter-claims [fol. 1464] against the officer-respondents and prayed for affirmative relief against them. This affirmative relief was allowed. Said Mr. Justice Butler, 296 U. S. 222, 239, 241-242:

> "Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the

circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them.

* * *

Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."

The directors were required, at the risk of forfeiting their rights, to comply with the invitation and order of court and present their claims in the receivership proceeding. See, also, the opinion of Circuit Judge Parker, (citing *Alexander* v. *Hillman*) speaking for our Court in *Florance* v. *Kresge*, 93 F. (2d) 786.

[fols. 1465-1466] It is contended by counsel for the DUKE that limitation proceedings in admiralty are distinctive and statutory, that they are *sui generis* and quite unlike suits in equity or ordinary civil actions in admiralty. It is said they are neither proceedings *in rem* nor *in personam*. Accordingly, we are told, admiralty courts in such unique and peculiar proceedings should not apply the usual doctrines of equity or admiralty. This technical contention leaves us rather cold. It does not wean us from the liberal view we have reached.

Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a single legal proceeding; (2) parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th. Admiralty Rule. Certainly

that spirit finds support in the Federal Rules of Civil Procedure.

The decree of the District Court, in so far as it exonerates the HAITI and holds the DUKE solely responsible for the collision, is affirmed. That part of the decree which denies the impleading of the Commission by the other claimants in the limitation proceeding is reversed. And the case is remanded to the District Court for further proceedings in conformity with the opinion.

Affirmed in part; Reversed in part and Remanded.

[fol. 1467] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION and CARL LUDWIG ABENDROTH, EMANUEL PHILIP ANHOLT, MATTHEW WILLIAM BAILEY, WILLIAM H. BAKER, M. J. BALL, WILLIAM H. BARKER, DONALD STANLEY JOHN BELLAMY, RAF, CAHN & BENDIT, LTD., ALISTAIR A. CAMERON, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, as Owner of the USNS HAITI VICTORY, Petitioning for Exoneration From or Limitation of Liability in a Cause of Limitation of Liability, Civil and Maritime,

Appellee.

Appeals from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

DECREE—Entered February 13, 1956

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court entered June 2, 1955, appealed from in

this cause be, and the same is hereby, affirmed; that the order of the said District Court entered May 12, 1955, appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk for further proceedings in conformity with the opinion of the Court filed [fol. 1468] herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Armistead M. Dobie, United States Circuit Judge.

NOTATION OF ISSUANCE OF MANDATE

March 17, 1956, mandate issued and transmitted to the Clerk of the United States District Court for the Eastern District of Virginia, at Norfolk.

[fol. 1469] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1470-1471] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. .....

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 10, 1956

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 12th, 1956.

Earl Warren, Chief Justice of the United States.

Dated this 10th day of April, 1956.

[fols. 1472-1473] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 247

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted limited to question 1 presented by the petition for the writ which reads as follows:

> "1. • • • The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3939-6)

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SUPREME COURT, U.S.
FILED
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JOHN T. FEY, Clerk

No. 247

Supreme Court of the United States

OCTOBER TERM, 1956

THE BRITISH TRANSPORT COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JULY 1956

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Supreme Court of the United States

OCTOBER TERM, 1956

No.

THE BRITISH TRANSPORT COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The British Transport Commission, a corporation established in Great Britain, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fourth Circuit entered on February 13, 1956 (Appendix, p. 23). The decree affirmed in part and reversed in part a final decree in admiralty of the United States District Court for the Eastern District of Virginia (Appendix, p. 10), and remanded the case for further proceedings.

The action is one in admiralty, originated by petition of the United States, as owner of the U.S.N.S. HAITI VICTORY, seeking exoneration from or limitation of liability arising out of a collision in 1953 in the North Sea between the HAITI VICTORY and the S.S. DUKE OF YORK, owned and operated by petitioner.

OPINIONS BELOW

The District Court's memorandum opinion and order holding that petitioner could not be impleaded by other claimants under Admiralty Rule 56 (Appendix, p. 1) is not reported. The same court's memorandum opinion exonerating the United States, as owner of the HAITI VICTORY, from liability, adopted by the court as its findings of fact and conclusions of law (Appendix, p. 10), is reported at 131 F. Supp. 712. The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix, p. 12) is reported at 230 F. 2d 139.

JURISDICTION

The decree of the United States Court of Appeals for the Fourth Circuit was entered on February 13, 1956 (Appendix, p. 23). On April 10, 1956, the time for filing a petition for writ of certiorari was extended to and including July 12, 1956 by an order signed by the Chief Justice. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The United States, as owner of a vessel which rammed the British Transport Commission vessel DUKE OF YORK in the North Sea, brought limitation of liability proceedings in the District Court. In accordance with Admiralty Rule 51, all persons having claims against the United States arising out of the collision were admonished to file them in this proceeding. Accordingly, the British Transport Commission, whose vessel was badly damaged by the HAITI VICTORY, filed its claim. The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of

Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision.

2. The HAITI VICTORY when she rammed the DUKE OF YORK was equipped with radar in good working order. She was navigating on a dark night in a heavily traveled coastal area and in the vicinity of a fog bank by which the DUKE OF YORK was hidden. Yet she did not utilize her radar, which, if used, would have disclosed the presence of the approaching DUKE OF YORK and of the fog which hid her from sight. The second question presented is whether under these circumstances the HAITI VICTORY is entitled to exoneration from liability for the collision.

3. For approximately a full minute after hearing the fog signal of the DUKE OF YORK forward of her beam, the HAITI VICTORY failed to stop her engines, in violation of the mandatory requirements of Article 16 of the Regulations for Preventing Collisions at Sea. There is no finding or evidence that, had the engines been stopped at once, the collision could not have been avoided. Indeed, the reasonable probability is that, if the HAITI VICTORY had not so violated the statute, she would not have rammed the DUKE. The third question presented is whether under these circumstances the HAITI VICTORY is entitled to exoneration from liability in spite of her admitted statutory violation.

STATUTES AND RULES INVOLVED

General Admiralty Rule 56 provides (254 U. S., app. p. 29, 28 U. S. C., 1952 ed., p. 4401):

> "RULE 56. RIGHT TO BRING IN PARTY JOINTLY LIABLE.
>
> "In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall

be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

Articles 16 and 29 of the Regulations for Preventing Collisions at Sea in effect at the time of the collision here involved (26 Stat. 320, 326, 328, 33 U.S.C., 1946 ed., §§ 92, 121), are as follows:[1]

"SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"NO VESSEL, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS.

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

STATEMENT

Shortly before dawn on May 6, 1953, where the English Channel opens into the North Sea, the Naval Transport HAITI VICTORY, owned by the United States,

[1] Effective January 1, 1954, these regulations were replaced by Rules 16 and 29, 65 Stat. 417, 419, 33 U.S.C. §§ 145n, 147a. No material change was effected in these Articles by this revision.

rammed the overnight channel ferry DUKE OF YORK, owned by petitioner. The bow of the HAITI VICTORY knifed so deeply into the port side of the DUKE OF YORK just forward of her bridge that the entire bow of that vessel broke away and sank. Several passengers on the DUKE OF YORK were killed, others were injured, and a large number lost their baggage. The HAITI suffered only minor damage to her bow, amounting to $60,040.48.

The United States as owner of the HAITI VICTORY filed a petition in the United States District Court for the Eastern District of Virginia under the Federal Limitation of Liability Statute (Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) and Admiralty Rule 51 seeking exoneration from or limitation of liability for all losses and damages resulting from the collision. Petitioner filed in this proceeding a claim of $1,500,000 for the losses and damages sustained by its vessel, the DUKE OF YORK. A number of death, personal injury and damage claimants also filed claims in varying amounts.

Some of these claimants then filed petitions in this case to implead petitioner, under the alleged authority of General Admiralty Rule 56. The District Court denied these impleading petitions, holding that other claimants could not implead petitioner for the reason that a limitation proceeding does not provide a forum for the adjudication of liability of claimants to each other (Appendix, p. 1). Then, after a trial, the District Court held that the DUKE OF YORK was solely to blame for the collision, and a final decree exonerating the HAITI VICTORY was filed in accordance with this opinion (Appendix, pp. 3-10).

On appeals by all parties, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court exonerating the HAITI VICTORY

and holding the DUKE OF YORK solely responsible for the collision. But it reversed the District Court's order denying the right of other claimants to implead petitioner under Admiralty Rule 56. While noting that the issue appeared "to be a question of first impression," the Court of Appeals held, largely in reliance upon analogies drawn from receivership proceedings, that impleader of petitioner was proper under the Admiralty Rules. It accordingly remanded the cause to the District Court for further proceedings.[2]

REASONS FOR GRANTING THE WRIT

In both the procedural and substantive parts of its decision—the bringing in of the Commission in the posture of a respondent, and the exoneration of the HAITI VICTORY—the Court of Appeals is in conflict with the law as laid down in other circuits, and has decided important questions of Federal law which have not been but should be settled by this Court.

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[2] The United States did not join with other claimants in attempting to implead petitioner in the District Court, although it filed a "cross assignment of error" on the appeal to the court below, stating that "the District Court erred in denying to claimants and to petitioner the right to cross-claim and implead the owners of the S.S. DUKE OF YORK". On remand to the District Court, following the decision of the Court of Appeals, the United States filed a so-called "cross libel" against petitioner, attempting to obtain service on petitioner by serving its proctors in this proceeding. Petitioner has moved to quash service of this cross libel and has also filed exceptions to it.

I

THE DECISION BELOW PERMITTING A CLAIMANT IN A LIMITATION PROCEEDING TO IMPLEAD UNDER ADMIRALTY RULE 56 THE OWNER OF ANOTHER VESSEL, ALLEGED TO HAVE CONTRIBUTED TO THE INJURY, CONFLICTS WITH A DECISION IN THE FIFTH CIRCUIT. IT IS A RADICAL INNOVATION IN ADMIRALTY PROCEDURE WHICH SHOULD BE REVIEWED AND REJECTED BY THIS COURT.

The court below, believing that this case presented "a question of first impression," and conceding that "the question is close and not free from difficulty," held that it was permissible under Rule 56 for claimants in this proceeding to implead the Commission, as owner of the DUKE OF YORK. While the question arose here for the first time in the Fourth Circuit, the precise point involved (that Rule 56 is inapplicable to limitation proceedings and, moreover, is never available to one in the posture of a plaintiff or libelant) has been passed upon four times adversely to the conclusion reached here—once by the Court of Appeals for the Fifth Circuit [*Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949)], and three times by the important admiralty district courts for the Southern and Eastern Districts of New York.[3]

The decision below has permitted transformation of a statutory proceeding by which the United States sought limitation from or exoneration of liability into a proceeding in which a claimant seeking redress against the United States under compulsion of a monition is-

[3] *New Jersey Barging Corp.* v. *T.D.A. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955) (appeal pending); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5, Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.).

sued at the behest of the latter may proceed against another claimant. In doing so, it is not only in conflict with the decisions in other circuits, but has jeopardized the usefulness of limitation proceedings for the purpose for which they are intended, and has authorized in the United States a practice not permitted in the other maritime nations of the world. Review by this Court is clearly called for.

1. The radical—and, we submit, erroneous—departure from the settled construction of Rule 56, and the nature of the conflict between the decision below and decisions in other circuits, require a brief reference to the history and purpose not only of Rule 56, but also of Rules 51-54, which regulate limitation proceedings. In our admiralty courts limitation procedure is over thirty years older than the third party practice which is the subject of Rule 56. The occasion for and the purpose of the latter rule had and has nothing whatever to do with the principles of limitation.

In this country, and in others where the right is granted, limitation is a legislative graft upon the principles of admiralty. As the size of ships grew with the passing of the days of sail, the liabilities which might be incurred by a shipowner in a major disaster could be so great as to discourage venturing on the sea. Maritime nations in general acted to permit limitation of liability. See Marsden, *Collisions at Sea* (10th ed.) pp. 175-178. The United States did likewise.[4] The Act of March 3, 1851 (9 Stat. 635, as amended, Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) permitted a shipowner to limit his liability for, among other things,

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[4] For a more detailed history of limitation of liability laws in this country and abroad, see *The Main* v. *Williams*, 152 U.S. 122, 126-128.

loss, damage, or injury from collision, occurring without his knowledge or privity, to his interest as owner of the vessel and her freight then pending. This Court has declared the purport of the statute to be "to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers,* 312 U. S. 383, 385. A proceeding in the admiralty to limit liability is a special proceeding, *sui generis.* 3 *Benedict on Admiralty* (6th ed. 1940) §§ 479, *et seq.*

The form of proceeding by which limitation of liability might be secured was not initially prescribed by the statute, other than that it should be "appropriate" (Rev. Stat. § 4284, 46 U.S.C. § 184); instead, procedure was provided by this Court in Rules 51-54 of the General Admiralty Rules. See *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214. A petitioner seeking limitation of liability, as did the United States here, files his petition in the appropriate District Court, which in turn brings into concourse, by monition, all who have claims against the vessel, and enjoins all claimants from suing the owner and vessel on such claims in any other court. In the event liability is determined, the *res* in the custody of the court, if there be any (the vessel, or its value as appraised after the occurrence of the loss, and the pending freight for the voyage) is then distributed pro rata to all established claims according to their priorities, innocent parties taking precedence and death and personal injury claimants having the benefit of Rev. Stat. § 4283(b), as amended, 49 Stat. 1479-80, 46 U.S.C. § 183(b).

2. During the century and more that this limitation of liability procedure has existed, it has been judicially administered so as to marshal, determine and dispose

finally of all claims against the shipowner-petitioner. In the furtherance of *that* purpose, the Court has given the Act a broad and equitable construction. What respondents have sought here is quite different. The court below, by fusing with this proceeding, so special in nature, the totally inapplicable third party procedure provided by Rule 56 for wholly different reasons, drastically changes the proceeding from one to limit liability of a shipowner-petitioner to one where claims against other claimants may also be adjudicated.

Rule 56 is, as suggested, later in origin and rooted in different considerations. In the October term of 1876 this Court decided *The "Atlas"*, 93 U. S. 302. It held, contrary to what, based upon British precedent (*The Milan*, Lush Adm. 388, 401), was said to have been the rule in the admiralty, that a libelant might recover his damages in full from one of two parties at fault, leaving the party sued to pursue contribution from the other wrongdoer. As a result of this decision, Judge Addison Brown, a distinguished admiralty judge, held in *The Hudson*, 15 Fed. 162 (S.D.N.Y. 1883), that where a libelant had proceeded against (libeled) one of two tugs at fault in a collision, the claimant (*i. e.*, the owner of the libeled tug) might, upon petition and proper service, have the other tug "brought in as a party to the action [libel] in order that the damages might be apportioned between the two tugs, as would have been done had the [other tug] been joined as a party and adjudicated in fault." *The Hudson* was decided February 7, 1883. Rule 56 (then Rule 59) was promulgated, institutionalizing the decision, on March 26, 1883, 112 U. S. 743. For a discussion by this Court of the nexus between decision and rule see *New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 527;

see also *Benedict on Admiralty* (3d ed. 1894) § 482b, pp. 271-72.

Rule 59 as adopted in 1883 read as follows:

> "In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam,* shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued. . . . "[5]

The Hudson was a collision case, and the resulting Rule 59 of 1883 was a collision case rule. Shortly thereafter, however, Judge Brown permitted the bringing in of a third party by the claimant of the libeled ship in a cargo damage case. "The case of The Hudson, supra," he said, "and the fifty-ninth rule in admiralty though not literally applicable furnish also an analogy for this order." *The Alert,* 40 Fed. 836, 839 (S.D.N.Y. 1889). This Court referred to *The Alert* with approval in *The Barnstable,* 181 U.S. 464, 467, and since then the respondent in an action *in personam,* or claimant of the vessel proceeded against in an action *in rem* (as the case may be) have brought in third parties in libel proceedings to enforce a lien for supplies, a lien

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[5] 112 U.S. 743. The remainder of Rule 59 in its original form is substantially similar to the last two sentences of present Rule 56. See p. 4, *supra.*

for towing services, for salvage, or for stolen, misdelivered or damaged cargo. 2 *Benedict on Admiralty* (6th ed. 1940) § 349, n. 24. This practice was in turn institutionalized in the revision of the General Admiralty Rules in 1920 in which Rule 59, as revised, became Rule 56. 254 U.S., app. p. 29.

It will be noted that in the original Rule 59 the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was "the claimant of any vessel proceeded against" (where the libel was *in rem*), or "any respondent proceeded against *in personam*". The "claimant" was not a person presenting a claim—one in the posture of libelant or plaintiff—but the claimant of the ship libeled—one in the posture of a defendant. When the rule was made applicable to other than collision cases, the word "claimant", as the context shows, retained that same meaning. The new language—that "in any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person"—shows that "claimant" still referred to the claimant of a vessel in an *in rem* action. It does not, as the court below appears to have assumed (Appendix, pp. 17-22), refer to a "claimant" in a limitation proceeding, who is a claimant *against* a vessel—a plaintiff—rather than a "claimant *of* any vessel proceeded against"—a defendant. The extension of the third party practice to libel actions other than those arising out of collision did not, in other words, change the basic fact that the procedure was available only to a party in the posture of a defendant—*i.e.*, a respondent or a claimant of a vessel proceeded against. A libelant, to be sure, has always been able to bring in other parties by amending his libel and serving them. He cannot, however, do so by petition under

Rule 56. *The Johan Poulsen*, 1925 A.M.C. 178 (D. Ore. 1924).

3. This reading of Rule 56, which the court below rejected, was expressly adopted by the Court of Appeals for the Fifth Circuit in *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949). The court below was under the impression that the *Jahncke* case did not decide the point at issue here. This was a misapprehension. The decision is in square conflict with the one below; if Rule 56 permits one claimant in a limitation proceeding to implead another, as the court below has held, it must perforce permit a claimant in such a proceeding similarly to implead a third party (assuming service can be had), which the Court of Appeals for the Fifth Circuit held he could not do. There is no possible basis in the language or history of Rule 56 to support a distinction between permitting impleader of a claimant in a limitation action and impleader of a third party "who may be partly or wholly liable". The District Court recognized this when it cited the *Jahncke* case as controlling its decision denying impleader: "the same principle there enforced governs here" (Appendix, pp. 1-2).

The decision below is also in square conflict with decisions in the Southern and Eastern Districts of New York. These courts have held that limitation proceedings are of such a special nature that not even the petitioner—the shipowner seeking limitation—may implead under Rule 56 either a claimant in the limitation proceedings or a third party. *New Jersey Barging Corp.* v. *T.D.A. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955) (appeal pending); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5, Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.); *cf. Algoma Central & Hudson Bay Ry. Co.* v. *Great*

Lakes Transit Corp., 86 F. 2d 708 (2d Cir. 1936), and *Moore-McCormack Lines, Inc.* v. *McMahon*, decided June 26, 1956 (2d Cir.), both discussed below. Circuit Judge Lumbard's opinion in the *New Jersey Barging Corp.* case, expressly following the *Jahncke* decision of the Court of Appeals for the Fifth Circuit, is particularly pertinent (135 F. Supp. at 99):

> "It would be odd, indeed, if a shipowner could, by the device of a limitation of liability proceeding, initiate on behalf of claimants it does not represent an action against the corporation in a jurisdiction where it could not otherwise be sued."

The leading writer on admiralty also states this as the general rule.[5] 2 *Benedict on Admiralty* (6th ed. 1940) § 349, 1955 Supp. p. 31.[6]

4. The Government apparently had little faith in the attempt to force the Commission to respond in damages under Rule 56, for it did not join the claimants in this effort. Instead, following the decision below and the remand of the cause to the District Court, the United

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[6] There are two district court cases which appear to authorize the petitioner in limitation to implead the owner of the other ship involved in a collision. *City of Boston*, 182 Fed. 171 (D. Mass. 1909); *The Clio—The Springhill*, 1948 A.M.C. 75 (S.D.N.Y.). But this appearance comes from the language of the opinions rather than the substance of the holdings. In both of these cases the owners of the vessels involved in the collisions had filed separate but simultaneous limitation proceedings in the same court. In each case one vessel owner had filed a claim in the other proceeding but not vice versa. In each case the court said that it was permitting the bringing in under Rule 56 of the vessel owner who had not filed a claim. But, in fact, that vessel owner was already proceeding for limitation in the same court. The action taken in each case was, in essence, the consolidation of the proceedings.

States filed what it calls a "cross libel", serving the Commission's proctors. Exceptions and motion to quash service have been filed in reply. (p. 7, n. 2, *supra*).

This was the procedure recently approved, we believe erroneously, by the Court of Appeals for the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon, supra.* It had been specifically disapproved years before by no less an authority on procedure in the admiralty than Judge Hough, because "the nature of the cause of action in limitation, the necessary framework of pleadings and the wording of Rule 50 prevents it." *The Steel Inventor,* 1925 A.M.C. 226, 228-229 (E.D.N.Y.).[7] As "persuasive," the court in the *Moore-McCormack Lines* case cited the decision below in the present case, but it did not discuss or consider the question presented here of the applicability of Rule 56 to a limitation proceeding, nor did it analyze the history or nature of either a limitation proceeding or the third-party practice in the admiralty.[8] Instead,

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[7] At a later stage of the *Steel Inventor* litigation, both vessels having been found at fault and a reference on damages having been made, the owners of cargo laden on the STEEL INVENTOR moved for leave to intervene to subject to their claims for damages any amount awarded to the United States, as owner of the U.S.S. WOOLSEY sunk in the collision. This was permitted by the Court of Appeals for the Second Circuit (24 F. 2d 657, 43 F. 2d 958, 961), and this decision in turn relied upon by that court in the *Moore-McCormack Lines* case, *supra*, as authority for permitting a cross libel. It is obvious, however, that allowance of cargo claims against a fund in the possession of the court is not the same as permitting a cross libel against a claimant, and is certainly a long way from permitting one claimant to implead another under Rule 56.

[8] There are, of course, considerations which distinguish the right of a limitation petitioner to file a cross libel from the right of one claimant to proceed against another under the guise of a Rule 56 impleader—the issue here. Whatever equitable rights there are between a limitation petitioner and a claimant against him (*cf. United*

it accepted uncritically analogies drawn from "modern civil procedure" without examining the problems which would be presented by the indiscriminate grafting of such procedure onto specialized admiralty practices:

> "As stated, we think there is authority; but in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids."

5. The idea that it is "convenient" practice to permit in limitation proceedings impleading of claimants or third parties—or cross libels against them—is quite wrong and derived from a supposed analogy to receivership proceedings. See *Alexander* v. *Hillman*, 296 U. S. 222. Indeed, that there is an analogy here is an illusion. For, if Rule 56, or a cross libel, should be enough to authorize bringing in a claimant in a limitation proceeding as a respondent, the consequences are likely to defeat rather than further the broad and salutary policies of the limitation of liability statutes. This is the answer to the argument of the court below based on the analogy of receivership proceedings. For in a receivership proceeding the court has in its control all the property of the insolvent within the jurisdiction. That property is to be distributed to creditors and the insolvent discharged from his debts. A rule that a creditor, filing a claim against the estate, subjects himself to claims by the estate is in furtherance of the purpose of the proceeding—to pay all creditors *pro rata* from the marshalled assets and to discharge

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States v. *The Thekla*, 266 U. S. 328) do not exist between persons whose only relationship is that they happened both to have filed claims in a limitation proceeding.

the insolvent. But an analogous rule is not in furtherance of a limitation proceeding.

For in the admiralty, if the ship is still afloat or if the owner has other assets, the court does not, as a practical matter, have all the property of the shipowner in its control. It has a fund equal to the value of the ship and pending freight. The ship herself may well be sailing the high seas. A foreign claimant cannot be compelled by orders of a United States court to come into limitation proceedings in the United States. *Cf. The Titanic*, 233 U.S. 718, 732. That claimant may wait until the ship enters a foreign port and libel her there.[9] The decrees and distribution of the fund in the United States court have no bearing on the foreign claimant who was never a party to the United States proceeding. So a rule which may, and will, discourage the coming in of foreign claimants, by threatening them with liability under American law, tends to defeat the purpose of the limitation proceeding, which is to entice all claimants into concourse to clear up the liability of the shipowner, and, if liability is found, to share one fund in discharge of all claims against him.[10]

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[9] In England, for example, the court is authorized to extend the period of the statute of limitations indefinitely when "there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court." Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57) Sec. 8.

[10] This is emphasized by a consideration of some of the practical effects in this case of the holding below that the mere filing of a claim in a limitation proceeding in this country subjected a British shipowner to entry of an affirmative decree for damages against it—binding on British courts, if that were possible. Under English law the Commission is entitled to initiate limitation proceedings in England, where the amount at which its liability may be limited is far lower than in the United States, generally £15 per ton of

So far as the limitation petitioner's possible counterclaim against any claimant is concerned, if he triumphs in the proceeding and is exonerated, the matter of fault is *res adjudicata* in his favor. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (2d Cir. 1936). He can then either pursue his adversary where he may be served, or "file an independent libel . . . and, if territorial jurisdiction permits, try the matters together." *The Steel Inventor*, 1925 A.M.C. 226, 228 (E.D.N.Y.). It is plain that the mere filing of a claim in the limitation proceeding does not create the necessary territorial jurisdiction.

Another grave difficulty, overlooked by the court below in relying upon the analogy of a receivership, is found in the question of whether, if a claimant in a limitation proceeding is to be subjected to the possibility of affirmative recovery against him by either another claimant or by the petitioner in that proceeding, he is entitled to petition for limitation of his own liability. The Court of Appeals for the Second Circuit has held that a claimant in a limitation proceeding is not thereby given the right himself to petition for limitation of liability. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (1936). In so deciding for a unanimous court Judge Learned Hand said, in discussing the nature of a limitation proceeding (86 F. 2d at 710):

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registered tonnage. Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503. Furthermore, the English rules of liability are substantially different from those applied in our courts. A carrier under English law may by appropriate contract and notice limit its liability for negligence, and periods of limitation for the assertion of damage or loss are different. See Collision Claims—Difference Between British and U.S. Law, Lloyds List and Shipping Gazette, July 14, 1953.

> "When there are more claims than one, a concourse is the only way to secure the owner's immunity, except at the greatest inconvenience and expense, if even these would avail. At no time can the owner recover a dollar by means of it from anybody."

If the decision below stands, the *Algoma Central* case must either be rejected or a claimant in a limitation of liability proceeding will be put in the impossible position of being subjected to liability while being deprived himself of the benefits of the limitation of liability laws. In fact, under the decision below, serious questions are presented as to how a claimant in a limitation proceeding may obtain the benefits of the limitation laws, even if the jurisdictional difficulty posed by the *Algoma Central* case is surmounted. As amended in 1936 (49 Stat. 1480), Rev. Stat. § 4285, 46 U.S.C. § 185, imposes a six-month period of limitation on the filing of such a petition after receipt by a vessel owner of a written notice of claim against him. Must every claimant in a limitation proceeding who might be held liable to the petitioner or to other claimants also petition for limitation of his own liability within this six-month period? Or is a claimant in a limitation proceeding who is impleaded by another claimant in accordance with the extraordinary doctrine enunciated by the court below entitled thereafter, without regard to the six-month limitation, to seek limitation of liability by answer or some other plea under Rev. Stat. § 4283, as amended, 46 U.S.C. § 183? Compare, *e.g.*, *The Irving*, 33 F. Supp. 59 (S.D.N.Y. 1940) and *The Joseph O'Donnell*, 37 F. Supp. 120 (E.D. N.Y. 1940) with *The Chickie*, 141 F. 2d 80 (3d Cir. 1944). These are only some of the serious questions precipitated by the determination below; they em-

phasize the faulty nature of the receivership analogy relied upon, and the necessity for review of this important question by this Court.

If we turn to the Admiralty Rules, we see that they are plainly written on the assumption that a claimant in a limitation proceeding may not as such be made to respond in damages. Due to the nomadic nature of ships, the admiralty requires that anyone instituting or entering a proceeding in which he might incur a judgment against him must put up security out of which the judgment might, if necessary, be paid. One filing a libel, or a cross libel under Rule 50, is required to do this. So, also, the petitioner in a limitation proceeding must turn over the ship and the freight to a trustee or file a bond in equal amount. But there is no provision requiring a claimant in a limitation proceeding to put up security at all. Very clearly this is because neither the Act of 1851 nor the Rules contemplated that such a claimant could be subjected to any liability. The purpose of the Act and the Rules is to bring all claims against the petitioning shipowner into concourse, both so as to limit his liability, if he is found at fault, and to discharge it if he is found entitled to exoneration. It is not to attempt a settlement of all claims *inter se*.

And it is further significant that Rule 56, formulated after thirty years of limitation proceedings, not only makes no reference to them, but is drawn to exclude them. For the rule is very specific upon the nature of the proceeding to which the rule is applicable. It is applicable to *libel* proceedings, whether *in rem* or *in personam*—a category into which limitation proceedings do not fall. The language of the rule makes this clear. First, as to the time when the rule may be invoked, it may be done "before or at the time of answering *the libel.*" Second, the rule provides that after service of

the petition to implead on the third party, "such suit shall proceed as if such vessel or person had been *originally proceeded against.*" Now it is only in a libel—and certainly not in a limitation proceeding—that a ship, or its owner, alleged to have been at fault is *"originally proceeded against."* Third, the rule goes on to provide that, after service of the petition to implead, the "new party shall answer the libel." In short, the whole wording of Rule 56 is directed towards its availability in libel proceedings and its inapplicability to limitation proceedings.

6. Finally, as this Court has recognized (*Just v. Chambers, supra*), the principle of limitation of liability is common to all the maritime nations of the world; but impleader of claimants in such proceedings, as allowed by the court below, is unknown. Since this decision will have international as well as national impact, the question should be reviewed and settled by this Court.

In England, for example, the right is now embodied in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) and other statutes. The petition for limitation of liability is made to the Admiralty Registrar in accordance with Rule LV (H) of the Rules of the Supreme Court [see The Annual Practice 1956 (London, 1956), pp. 1211c to 1212]; which makes no provision for either counterclaims or impleaders among co-claimants.

Likewise, in the continental countries impleader is unheard of. In France, the owner of a vessel can in effect exonerate himself from liability (if without personal fault) by "abandon" of vessel and freight. Code Comm., Art. 216. The owner may, in such a proceeding, assert a "compensation" (a set-off, but not an affirmative judgment) against a claimant, but even this slight "broadening" of the limitation action which France

alone among the continental countries appears to sanction, has been criticized. See Ripert, Droit maritime (1952 ed.) Sec. 1322. The rule (except for "compensation") is the same in Belgium (Code de Comm., L. II, Art. 46 *et seq.*; see Répert. prat. du droit belge, VIII, V° "Navire-Navigation," Nos. 318-321 (1951), Italy (Cod. di Comm., Arts. 491 *et seq.*; Cod. di Navig. (1941) Arts. 275-277, 620 *et seq.*; see d'Ovidio-Pescatore, Manuale di diritto della navigazione (1950) pp. 442 *et seq.*) and Holland (Comm. Code, Art. 541, see Woltman, De Bepertke Aansprakelijkheid van den Reeder (Leiden, 1936), p. 211).

In Germany the concept prevails that the vessel itself, and not the owner, is responsible for damages done by it, and hence the responsibility of the owner of the vessel, unless personally negligent, is limited from the outset to his interest in the vessel. Under the German system there is no need for proceedings to limit liability or to declare "abandon" and have it approved by the court, and no occasion for any procedural move which resembles impleader. German Commercial Code (HGB) sec. 486; Wüstendörfer, Neuzeitliches Seehandelsrecht (1950 ed.) pp. 125-130, 133; Gierke, Handelsrecht und Schiffahrtsrecht (1955 ed.) Sec. 81; see Ripert, *supra*, Sec. 1283. The concept of limitation of liability in the Scandinavian countries generally follows the German pattern. [11]

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[11] The Brussels Convention of August 25, 1924 (League of Nations Treaty Series, No. 2763) has been ratified by a number of countries and has produced some uniformity in respect to the *amount* of liability to which the owner is to be held subject in a limitation proceeding. It has not been ratified by the United States, the United Kingdom, or Germany. Currently efforts are being made to rewrite the Convention to increase the scale of liability so as to encourage its broader adoption. See Le droit maritime francais, Vol. VIII, p. 1. (Jan. 1956).

Neither in the codes of these various countries, nor in the commentators upon them, have we found a suggestion that the result reached by the court below is even possible. The limitation proceedings remain restricted to the original parties in the position which they occupied at the outset. The exoneration of a vessel involved in a collision would terminate the proceedings, and a new action would be required in order to assert any claim against the other vessel. A decision which permits imposition of liability upon foreign shipowners in a way which is so drastically different from that permitted by the law of other maritime nations should be reviewed and evaluated by this Court.

II

THE DECISION PERMITTING THE HAITI VICTORY TO CHOOSE "TO REMAIN BLIND WHEN SHE HAD MEANS TO SEE" IS AN ANACHRONISM IN CONFLICT WITH BASIC PRINCIPLES ACCEPTED AND APPLIED BY OTHER COURTS, PARTICULARLY THE COURT OF APPEALS FOR THE SECOND CIRCUIT. IT PRESENTS AN IMPORTANT QUESTION UNDER THE INTERNATIONAL RULES WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Unusual as this is in collision cases, the present case has not presented any major conflict of testimony; all agree substantially on what took place, and when. But in exonerating the HAITI VICTORY on these facts, the lower court cut adrift from important principles laid down by the admiralty courts in this country and abroad. If its decision stands, it will confuse and relax accepted standards under the International Regulations for Preventing Collisions at Sea. A summary of the relevant facts found by the two lower courts will make this clear.

A. THE FACTS [12]

The HAITI VICTORY is a 439 foot single-screw Victory ship, equipped with radar. On May 6, 1953, bound up the English Channel for Bremerhaven, she took on a Trinity House pilot at Dover, just after 0117 British summer time. Her course took her slightly to the east of Galloper Lightship, off Harwich, England. She was maintaining her maximum speed of 17-18 knots (Appendix, pp. 4-5).

The collision occurred in the darkness shortly before dawn, some two miles east of Galloper Lightship, when the DUKE OF YORK emerged on a crossing course from an undetected patch of fog on the HAITI VICTORY's starboard bow (Appendix, pp. 3-5). In the words of the HAITI VICTORY's pilot, this area was "the meeting place of two lanes of shipping" (Tr. 151). In fact, as the District Court noted, very shortly before the collision the HAITI VICTORY had been required to make a sharp alteration of course to starboard to avoid another ship, the lights of which had been first seen some four to five miles away (Appendix, pp. 4-5, 8). It is undisputed, too, that traffic along the whole route from Dover to Galloper had been very heavy, the HAITI VICTORY's pilot stating that he had sighted some 50 ships on the way (Tr. 134).

Both courts below found that there were no actual signs of fog prior to the time the DUKE OF YORK was discovered off the HAITI VICTORY's starboard bow, and that the HAITI VICTORY accordingly neither knew nor

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[12] Although the Commission urged below that the DUKE OF YORK should not have been held at fault and still believes this position supported by the record, it recognizes that this now presents no issue appropriate for this Court. Accordingly, the DUKE OF YORK's actions are not discussed in detail.

should have known of the existence of the fog patch along her track (Appendix, pp. 7-8, 15). On the other hand, the District Court recognized that "the HAITI VICTORY'S master did not completely undress on turning in, staying ready for any call, including a fog alarm", and it referred to testimony that fogs were frequent in the North Sea at that time of year (Appendix, p. 9).[13] It further found that on this particular night a meteorological cold front was moving over the North Sea from northeast to southwest. It included drizzle, overcast, and patches of fog with very poor visibility. At 0400 hours the front itself was still some 60 miles northeast of Galloper Lightship but was twice as far down the European coast as it was on the English side. Visibility along the English coast was "fair", but the "night was dark" (Appendix, p. 6). As early as 0300, an hour and quarter before the collision, the weather around Galloper Lightship was already "cloudy with wet dew," overcast with moon or stars visible only at times (Appendix, p. 6). Shortly before the collision, the HAITI VICTORY'S pilot thought there was still good visibility, but he noted that "it was

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[13] The master of the HAITI VICTORY testified that he knew that fog shows up "quite often through there. And very unexpected, so you usually are ready for it" (Tr. 245). His testimony is confirmed by *Sailing Directions for the East Coast of England* (U.S. Navy H. O. Pub. No. 150, 5th ed. 1951), which states that "fog and mists occur at all seasons of the year in the vicinity of the English coast. Thick weather, verging on fog is very common." It goes on to say that along the whole East Coast of England, "fog occurs on from six to ten days" in the months of April and May (Par. 1-40, pp. 10-11). The HAITI VICTORY herself had experienced fog the previous day (Tr. 189, 194).

a smooth sea and a grey sky and there was no horizon anywhere" (Tr. 164).[14]

The HAITI VICTORY was equipped with a modern and efficient radar, the viewing scope of which was located on the bridge itself, to starboard of the wheel and slightly abaft the engine telegraphs (Tr. 187-88, 264-65). After leaving Dover the set was turned to "standby"—a position in which it was not in actual operation but from which it could be turned on instantly if needed. It was apparently not kept in continuous operation because no fog was known to be about and because, as the court below stated, some of its components had a short life and it was therefore desirable to ration its use (Appendix, p. 16). Although kept on "standby", there is no indication that it was again used, even for an intermittent check, until several minutes before the collision, when the HAITI VICTORY's second mate turned it on in order to ascertain his distance from Galloper Lightship (Appendix, pp. 9, 16-17; Tr. 160-61, 191). Even then, no real attention was paid to it. Although, so the District Court found, the DUKE OF YORK was probably visible on the radar screen at the time this navigational check was made by the second mate, the ship was not observed or reported (Appendix, p. 9). The first radar observation of the DUKE OF YORK came after the DUKE's fog whistle had been heard off the starboard bow, when the pilot, unable to see anything in that direction, ran to the radar and immediately observed on the screen what turned out to be the DUKE, then only ap-

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[14] In the quarter in which in fact there was a fog bank which hid the DUKE OF YORK from view, the HAITI VICTORY's second mate similarly noted that this "was very difficult to see because it was right in the quarter of daybreak with the low overcast sky. The sky and sea merge so there was no visible horizon" (Tr. 204).

proximately one-half mile away and 35° on the starboard bow.

B. THE QUESTION PRESENTED IS ONE OF IMPORTANCE TO THE MARITIME WORLD WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The nature of the duty imposed upon a ship equipped with radar to use it is one of first impression in this Court. The present decision gives an extraordinarily narrow interpretation to the obligation imposed by the general precautionary rule[15] on a radar-equipped vessel proceeding at high speed through darkness in crowded waters where fog is frequent. It ignores the principal value of radar as an anti-collision device—its use to prevent hazardous close quarter situations from developing and thus to avoid the dangers lurking in *undiscovered* as well as known fog banks or other areas of impaired visibility. It runs counter to principles clearly established in the Second Circuit and widely accepted by other courts and writers. It has introduced doubt and confusion into an increasingly vital area of maritime responsibility, and has unnecessarily set back the clock on the program of safety at sea. This Court should review and reverse the decision.

"Radar"—a word derived from Ra[dio] D[etection] A[nd] R[anging]—is an electronic device perfected during World War II which produces immediate and accurate distances and bearings on objects within the instrument's range. It is hard to overemphasize the importance of the contribution which this invention has made to safety at sea. The United States Coast Guard has described it as "the best anti-collision device yet perfected." In 1949, it commented that:

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[15] Article 29 of the Regulations for Preventing Collisions at Sea. See p. 5, *supra*.

"This remarkable technological achievement, conceived long before the war but brought to practical success only by the impact of war, has become one of the most important single safety features put to use on merchant ships. As time goes by, it can be reasonably expected that Radar scopes on bridges of ships will be as common sights as gyrocompasses." [16]

Recent statistics bear out this Coast Guard prediction, and emphasize the increasing need for a definitive determination of the nature of the duties and responsibilities to which its availability gives rise. [17] Data com-

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[16] *Ocean Electronic Navigational Aids* (USCG Pub. CG 157, 1949) p. 41. The Coast Guard is by no means alone in its high appraisal of the value of radar. Mr. E. C. Phillips, of the National Federation of American Shipping, has stated:

"As a technical organization we know that in radar our vessels have been given one of the most potentially important and useful devices ever to be conceived. We know that it can provide a safety factor unsurpassed by any other device aboard ship. We know that time and again it has proved an economic advantage. We know that ship masters who have once been subjected to its abilities look upon it as a favored instrument." "Five Years Progress in the Application of Radar to Marine Navigation", p. 4, Radio Technical Commission for Marine Services, Symposium Papers Delivered at Spring Assembly Meeting, Baltimore, Md., April 19-20, 1951.

[17] A representative of the National Federation of American Shipping has reported that "the most significant aspect of radar in the eyes of the shipping industry is its legal aspect." See Phillips, "Five Years Progress in the Application of Radar to Marine Navigation," p. 1, *supra* note 16. The question of the impact of radar on the legal responsibility of shipowners has received considerable attention from commentators. See *e.g.*, Griffin, *American Law of Collision* (1949) § 133; Wiley, "Radar and the Rules of the Road at Sea", *Journal of the Institute of Navigation*, January,

piled by the American Bureau of Shipping and the Maritime Administration of the Department of Commerce, for example, indicate that more than half of the privately owned American ocean-going vessels of 1,000 gross tons and over were equipped with radar as of December 31, 1955, and that all such passenger-carrying vessels of 10,000 tons and over were so equipped. The Annual Report of the Federal Communications Commission for 1955 (p. 72) reports that as of June 30 of that year "more than 2,600 United States ships were authorized to use radar". Comparable or even greater use of radar by British vessels is indicated.[18] Certainly the widespread practical importance of ship-borne radar today is beyond question.

C. THE DECISION BELOW IS INCONSISTENT WITH THE SECOND CIRCUIT RULE ON THE DUTY TO USE RADAR WHEN AVAILABLE.

The leading case on the duty of a vessel equipped with radar to use it is Judge Byers' decision in *The Medford,* 65 F. Supp. 622 (E.D. N.Y. 1946). In this case the S.S. THOMAS BARRY, a U. S. Army transport equipped with radar, entered a fog bank without having its radar set in operation. It then struck and sank the trawler MEDFORD. The Court said (65 F. Supp. at 626-27):

1950, p. 10; Kerrins, "Effect of Radar on Collision Law," *Proceedings of American Merchant Marine Conference* (1948), vol. 13, p. 190.

[18] Official statistics furnished by the British Ministry of Transport show that as of October 31, 1955 some 70% of all ships of 1600 gross tons or more registered in the United Kingdom were fitted with radar. The Liverpool Underwriters Association 153d Annual Report, 1954 (p. 15) estimated that over 7000 vessels were then fitted with radar equipment, and that it was being installed in British and foreign vessels at the rate of some 1000 per year.

"The failure of the *Barry* to use her radar is the most serious and sinister aspect of these causes. The perfection of that device is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area. . . . It is impossible to yield to the argument for the *Barry* that her conduct is to be condoned to any extent, in view of her failure to employ the very device which was installed to prevent a collision. . . ."

This rule was soon approved and applied by the Court of Appeals for the Second Circuit in litigation arising out of a wartime collision between two merchant ships, the HINDOO and the AUSTRALIA STAR. On a dark but clear night, under blackout conditions, the AUSTRALIA STAR's skipper received from her radar operator word of vessels (the HINDOO and her naval patrol-craft escort) on a crossing course, at first seven to eight and later three miles away. The AUSTRALIA STAR turned on her navigation lights and they remained on until the collision occurred, some twelve minutes later. But the skipper did not request and the operator did not furnish any further radar report. The HINDOO was not equipped with radar and did not turn on her navigation lights until the moment of collision.

Judge Rifkind held both vessels at fault. The fault of the AUSTRALIA STAR, he ruled, was in "failure to make adequate use of the radar facilities" with which she was equipped. He held that this failure was a violation of the general precautionary rule embodied in Article 29 of the International Regulations for Preventing Collisions at Sea (*supra*, p. 5), even though the AUSTRALIA STAR had switched on her navigation

lights in ample time and so had made herself known to the other vessel (*The Hindoo*, 74 F. Supp. 145, 149):

> "It has been suggested that to hold the Australia Star at fault is to penalize her because of her equipment with radar. That is a misconception. The conduct which is regarded as negligent on the part of a person of sound vision is not the same as that which is condemned when practiced by the blind. The fault of the Australia Star is that she chose to remain blind when she had the means to see.
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> "Prudent navigation involves taking advantage of all the safety devices at hand. Insofar as it is the judicial function to fit scientific discoveries into the framework of laws not tailored to their measure, the function should be carried out with an eye to the general purposes of the law, and to desirable social ends." [19]

The Court of Appeals affirmed on this point, emphasizing the fault of the AUSTRALIA STAR in failing to utilize her available radar after having turned on her navigation lights. *United States* v. *The Australia Star*, 172 F.2d 472, 475-76 (2d Cir. 1949).

Except for the decision below, no case has been found which departs from the principles thus applied in the Second Circuit, [20] and they find their counterpart in British and Canadian decisions.

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[19] See approving comments on this principle by Capt. J. E. Madacey, U.S. Coast Guard Staff, Office of Merchant Marine Safety, in "Are We Getting the Most from What We Have," pp. 8, 9, Radio Technical Commission for Marine Services, Symposium Papers Delivered at Spring Assembly Meeting, Washington, D. C., April 20-22, 1953.

[20] Of course, it is not negligence to shut off a radar set which is malfunctioning and not producing usable data (*Pocahontas S.S. Co.*

In *The Esso Plymouth*, [1955] 1 Lloyd's Rep. 429 (Adm. Div.), a British admiralty court held a ship at fault for failing, among other things, to use her radar when approaching a bank of smoke. The court said (at 437):

> "Moreover, the 'Esso PLYMOUTH' had on board a potential silent look-out, which could have been used if it had been made available in time. In saying that I am speaking of her radar instrument. It must have been known to those in charge of her from the time she rounded Tilbury Ness that she would run into this bank of smoke when she got to the top of Northfleet Hope. She had plenty of time to switch on her radar, and, if that had been done, it would have been working before the 'ESSO PLYMOUTH' reached the bank of smoke. I assume that if it had been working some earlier notice of the presence of the QUEENSLAND and ELBLAG would have been received by her, and in those circumstances, it seems likely that steps would have been taken at a much earlier stage to reduce the risk of collision. I can think of no good reason why there was that unfortunate delay in switching on the radar of the 'Esso PLYMOUTH'."

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v. *The Esso Aruba*, 94 F. Supp. 486 (D. Mass. 1950) aff'd, 197 F.2d 422 (1st Cir. 1952)), nor does failure to be equipped with an adequate search radar yet make a ship unseaworthy (*Anglo Saxon Petroleum Co., Ltd.* v. *United States*, 88 F. Supp. 158 (D. Mass. 1950). Conversely, the use of radar does not excuse excessive speed in fog (*Wood* v. *United States*, 125 F. Supp. 42 (S.D. N.Y. 1954)). None of this has any bearing on the obligation of a ship equipped with accurate and fully operative radar to use it where such use might enable avoidance of disaster.

See also *The Chusan*, [1955] 2 Lloyd's Rep. 685, 694-95 (Adm. Div.), where it was said to be "a part of any seaman's duty, in the exercise of reasonable care, to take full advantage of any equipment with which his vessel is equipped", and *The Dagmar Salen* v. *Puget Sound Navigation Co.*, [1951] S.C.R. 608, 613, 1951 A.M.C. 1253, 1258, where the Supreme Court of Canada condemned both radar-equipped ships involved in a collision, but assessed two-thirds of the damages against the ship failing to observe her radar: "If the radar screen had been closely and accurately observed, the course of the Dagmar would have been clear and the risk eliminated."

Indeed, the rule of the Second Circuit—as stated by Judge Rifkind, that a ship may not choose "to remain blind when she had the means to see"—is not a novel doctrine, afloat or ashore; it is merely an application of the tort principle that one endowed with superior qualities of perception or having available a superior instrumentality must utilize them, if to do so would eliminate undue risk of harm to others. *Restatement, Torts*, § 298, especially comment *c*; Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 1, 13-15 (1927); Prosser, *Torts* (2d ed. 1955) pp. 126, 132.[21] As Professor James has said:

> "As scientific knowledge advances, more risks can be discovered and avoided. Those who deal

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[21] This principle has in fact been applied by the courts in a number of instances such as, *e.g.*, the duty imposed upon physicians to use available X-ray machines to assist in their diagnoses, although they would not be liable for malpractice had no such device been available to them. *E.g.*, *Rankin* v. *Mills*, 207 Cal. 438, 278 Pac. 1044 (1929); *Whitson* v. *Hillis*, 55 N.D. 797, 215 N.W. 480 (1927); *Kalloch* v. *Hoageland*, 239 Fed. 252 (6th Cir. 1917). See Note, 27 Cornell L.Q. 577 (1942).

> with matters affected by these advances must keep reasonably abreast of them. What is excusable ignorance today may be negligence tomorrow. . . . Only a few years ago there was no way to detect a transverse fissure in a steel rail. Today this can be done by the Sperry Detector car and the conduct of railroads will be judged in the light of this fact." [James, *The Qualities of the Reasonable Man in Negligence Cases,* 16 Mo. L. Rev. 13-14 (1951)].

Nearly 25 years ago Judge Learned Hand went considerably further than this when he held for a unanimous court that it was negligence for coast-wise tugs to remain deaf to available weather reports when they could provide themselves with readily available ears in the form of inexpensive radio receiving sets. *The T. J. Hooper,* 60 F.2d 737, 740 (2d Cir. 1932):

> "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omissions" (60 F.2d at 740).

As the facts stated above show, these principles are directly applicable in this case. The two courts below found that the HAITI VICTORY was "neither in a fog nor chargeable with notice of the nearby fog patch" (Appendix, pp. 7, 15). Although petitioner urged below and still believes that these findings are erroneous, [22] they are accepted here, as they must be. *Mahnich*

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[22] See, *e.g.*, testimony of the HAITI VICTORY'S second mate that at the time the DUKE'S whistle was reported he noticed a halo of fog around his own masthead light (Taylor, Tr. 194). It is unlikely in the extreme that such signs of fog had at that moment first appeared.

v. *Southern Steamship Co.*, 321 U.S. 97, 98-99. But there can also be no dispute that the likelihood of fog was sufficiently great to justify what the District Court called certain "precautions" against it; and that the HAITI VICTORY was proceeding at high speed on a dark and overcast night in a heavily traveled coastal area where fog was frequent, believing the weather to be clear on the basis of visual evidence, but without knowing whether or not in some quarters there were fog patches which could not be seen.

If the HAITI VICTORY had had no means of protection against this hazard, serious though it might be, she may well have been within her rights in taking this action. *Cf. The Canadian Mariner*, 39 Lloyd's L. Rep. 179, 181 (C.A. 1931); *The Themistocles*, 4 Lloyd's L. Rep. 107 (C.A. 1919). Even in heavily traveled waters a ship without radar is not at fault for failing to sight a vessel hidden by undiscoverable fog, any more than a blind man crossing a street is at fault for being unaware that a speeding automobile is bearing down on him. The situation is very different, however, where the ship has sight through radar. The HAITI VICTORY had readily at hand the means to protect herself against the extreme dangers presented by undetected fog patches in this crossroads of shipping lanes.[23]

The HAITI VICTORY's radar was turned on "standby"

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[23] The HAITI VICTORY's radar had a minimum range of 80 yards and a maximum range of 81,070 yards (over 40 miles), with a range accuracy of ±1% and a bearing accuracy of ±2°. The range scale in use at any time could be set manually at 1½, 4, 8, 20 or 40 miles, for close-in or distant search (Tr. 264). At the time of the collision, it was operating on the 4-mile scale (Tr. 191, 216). The "PPI" viewing scope, 12 inches in diameter, was located on the bridge itself (Tr. 187-88, 215, 265).

The PPI or "Plan Position Indicator" scope somewhat resembles

—ready for use—yet no effort was made to use it even for the few seconds needed from time to time to make a periodic search or check. Fog as such, of course, is not detectable on radar, any more than it can be seen by eye on a dark night, but any ship or other danger which is obscured by fog will be discovered if radar is used. The explanation that its use had to be rationed because of the relatively short life of some of its components (Appendix, p. 16) is no justification for failure to use it for at least brief intermittent searches. It was, in fact, so used by the second mate for a navigational check of the Galloper Lightship, then being passed to port. This was done at approximately 0414 hours—a minute before the DUKE OF YORK's whistle was first heard and when the collision could still clearly have been avoided. Yet not even a glance was given to see whether any "blip" appeared on the radar screen which could not be verified visually. The explanation given by the District Court and approved by the Court of Appeals for this almost incredible failure of the second mate to see the DUKE OF YORK on the radar scope was that:

> "he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the DUKE was not negligence, for it was not the result of neglect of

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a small television screen in appearance. The viewer's own ship is located at the center of the picture, and land, structures and other ships appear as "blips" of light elsewhere on the scope. Their distance and bearing may be read off directly from range and bearing scales on and around the scope itself. For a more detailed explanation and illustrations of radar scopes and their operation, see Wylie, *The Use of Radar at Sea* (1953) pp. 1, 25, 34, 85-95; Sonnenberg, *Radar and Electronic Navigation* (2d ed. 1955) pp. 195-209; Penrose and Boulding, *Principles and Practice of Radar* (5th ed. 1955) pp. 358-84.

an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it." (Appendix, pp. 9, 16-17).

In other words, without some affirmative visual indication that fog or obscurity actually existed in some quarter—and of course such fog or obscurity could not be seen visually on a dark and overcast night with no horizon visible—there was no duty to use a readily available method of ascertaining with certainty the existence of the extreme hazards which such possible fog or obscurity might hide.

The court below, in effect, writes out of the general precautionary rule the duty of the prudent navigator imposed in the Second Circuit, when proceeding in shipping lanes on a dark night, to take advantage of all the safety devices at hand—specifically to use radar to detect objects which, except for the unexpected, should be within visible range, but which in fact cannot be seen.[24]

The essence of the matter is summed up by a recent writer:

> "Radar has proved itself to be of great value as an aid to avoiding collision in fog. The advantage which it confers, however, is not so much in assisting dramatic last-minute avoidance, as in enabling potentially dangerous circumstances to be rectified

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[24] The HAITI VICTORY's pilot instantly recognized the necessity for this use upon hearing the DUKE OF YORK's whistle and seeing nothing. He immediately ran to the radar, and there saw the DUKE. "Once I saw it on the target on the radar, I couldn't see with my eyes. I was no longer puzzled. I was very worried" (Tr. 153). He testified that he then knew that he must be running alongside a fog bank—as in fact he was (Tr. 143).

in their early stages. In studying the use of radar for this purpose it is most important to appreciate that radar is not at its best in rapidly changing close-quarter situations, and that much depends on the manner in which the limited contribution it can make is used. . . ."[25]

This very use—to provide an early warning of the existence of an approaching ship and of the unseen fog bank which hid her from view—was the use to which the HAITI VICTORY should have put her radar. Had she done so, there is no doubt but that the collision would have been avoided. The decision below is a backward step which can serve only to discount the enormous potential contribution to safety at sea of this great invention. The question presented is thus one which this Court should review and settle for the guidance of the merchant marine as well as of the lower courts.

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[25] Wylie, *The Use of Radar At Sea* (1953) p. 134. See also "The Cause of Collisions at Sea with Radar", in *Journal of the Institute of Navigation*, April, 1955, pp. 125, 135: "The most important thing that radar gave me as a commanding offieer was the fact that you did not allow a close situation to develop."

Of course no suggestion is made that radar is a substitute for the exercise of skill and judgment, or that it provides any excuse for failure to comply with the Regulations for Prevention of Collisions at Sea. *Cf., e.g., Wood v. United States*, 125 F. Supp. 42 (S.D. N.Y. 1954); *The Prins Alexander*, [1955] 2 Lloyd's Rep. 1 (H.L.); *The Ship "Baranof" v. D. Gratsos et al.*, [1953] Ex. C. R. 74, 1953 A.M.C. 393 (Brit. Columbia Exch.), aff'd. Sup. Ct. Canada, March 8, 1954 (unreported). A great many collisions have occurred between radar equipped ships, a number of them attributable at least in part to careless or improper use of radar as well as the failure to use it at all. See compilation of collision statistics in 18 *Proceedings of Merchant Marine Council 1950-52*, pp. 190-213. This merely emphasizes the importance of clarifying the duty to use this potentially magnificent safety device, and to use it properly.

III

THE DECISION EXONERATING THE HAITI VICTORY IN SPITE OF A PLAIN STATUTORY FAULT IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The second paragraph of Article 16 of the Regulations for Preventing Collisions at Sea provides (p. 5, *supra*):

> "A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." [26]

The law has been settled since at least *The Pennsylvania*, 19 Wall. 125, that a ship whose conduct has violated a statutory duty is not entitled to exoneration from liability for an ensuing collision unless it can meet the burden of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" (19 Wall. at 136). In refusing to apply this rule here, the court below has disregarded important principles enunciated by this Court, has rendered a decision in conflict with applicable decisions of two other courts of appeals, and has created a precedent which can only result in confusion in an important area of admiralty law.

The undisputed events directly leading up to the collision, as summarized by the Court of Appeals, were as follows:

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[26] The corresponding paragraph of Rule 16 of the Revised Regulations for Preventing Collisions at Sea, effective January 1, 1954, is identical except that the phrase "power-driven vessel" is substituted for "steam vessel". See 65 Stat. 417, 33 U.S.C. § 145n.

"The first notice those on the HAITI had of the presence of the DUKE was a single blast whistle from the DUKE. The bow lookout of the HAITI promptly reported to the bridge by telephone that he had heard what he thought was *a ship's whistle off the* HAITI's *starboard bow*. This whistle was also heard by the helmsman and pilot of the HAITI. The time, then, was apparently *about 0414*.

"'The pilot dashed out on the starboard side of the wheelhouse, looked around, saw nothing and went to the radar which disclosed an echo off the starboard bow. He again went out, saw nothing and *stopped the engines, around 0415*. Those on the HAITI *thought the single blast they heard was a fog signal*, but they were not sure of this.

"Apparently in about a minute, the HAITI pilot saw the DUKE crossing from starboard to port, gave the order hard right, blew one short blast and went full speed astern. The full speed astern was logged on the HAITI at 0415½, *the collision at 0416*. The HAITI changed course from 036° to 079° before striking the DUKE. The pilot of the HAITI testified that when he first saw the DUKE looming out of the fog, there was nothing that could be done by the HAITI beyond the hard right and full speed astern. A survey of the deformation of the plates, which is the resultant of the velocities of the ships, showed the speed of the DUKE, at the moment of impact, to be from 2 to 4 times the speed of the HAITI" (Appendix, p. 15) (italics supplied).[27]

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[27] The District Court's findings were similarly that the DUKE's fog whistle was heard "just after 0414 hours", being reported by the forward lookout as "off the starboard bow", and that the pilot finally stopped his engines at "0415 hours". The ships were together "at 0416" (Appendix, p. 5).

Thus, although the HAITI VICTORY was proceeding at her full speed of 17-18 knots, her pilot did not immediately stop her engines upon hearing the fog signal forward of the beam, as required by the statute. Instead, he wasted what both courts below found to be about a minute in first vainly attempting to locate the ship visually from the starboard wing of the bridge, then in running to the radar where he did find it on the bearing approximately indicated by the sound of the whistle, then in returning to the wing of the bridge to look futilely into the fog bank a second time—all before giving the order to stop engines.

The importance of the specific rules of conduct laid down by Article 16 was made perfectly plain by this Court in *Lie* v. *San Francisco & Portland S.S. Co.*, 243 U.S. 291, 296:

> "The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

The decision of the court below exonerating the HAITI VICTORY in spite of a clear violation of this Article is not only inconsistent with the interpretation of Article 16 by this Court in the *Lie* case, but is squarely in conflict with decisions of the Courts of Appeals for the Second and Ninth Circuits in very comparable circumstances. *Johnston-Warren Lines* v. *United States*, 196 F.2d 689 (2d Cir. 1952); *The Silver Palm*, 94 F.2d 754.

(9th Cir. 1938). It is not clear whether the court below disregarded the violation of Article 16 on the theory that the HAITI VICTORY's people were not at first *certain* that the whistle they heard off the starboard bow was a fog signal (although admittedly they thought it was), or on the ground that the Article requires only an early, not an immediate stoppage of the engines.[28] In either event, the conflict with the decisions of the Second and Ninth Circuits is clear.

In the *Johnston-Warren* case, a lookout "thought" he heard a fog signal forward of the beam; the ship's third mate, not being sure, waited approximately one minute (as did the HAITI VICTORY's pilot here), until he himself heard the signal repeated, before giving the order to stop. Although in the *Johnston-Warren* case the ship was proceeding at a relatively modest speed, the court held that she was at fault in failing to stop her engines immediately:

> "Thus, at a speed of six knots, over 600 feet was traveled in that interval, bringing the Longview that much nearer to the path of the Jessmore. As far as we are concerned, the only sensible interpretation of an anti-collision rule like Article 16 is that the ships must stop *when they hear something which they have good reason to suspect is a fog whistle ahead*" (196 F.2d at 691) (italics supplied).

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[28] That this latter theory may have been a basis for the court's decision is indicated by its citation of *The Anna M. Fahy*, 153 Fed. 866 (2d Cir. 1907), a case which did not involve Article 16 or a collision in fog at all, but had to do only with the statutory duty of a vessel owner to mark with a buoy a submerged vessel which constitutes a hazard to navigation. In the course of its decision the court remarked, *obiter*, that the word "immediately" as used in a statute might in some contexts mean within a reasonable time.

The Court of Appeals for the Second Circuit distinguished its earlier decision in *Steffens* v. *United States*, 32 F.2d 206 (1929), in which it was uncertain whether the signal heard came from forward of the beam or from a bearing further aft. Here the whistle was described by both courts below (and by all of the HAITI VICTORY's witnesses[29]) as coming from the starboard bow, and the evidence in support of the Court of Appeals' statement that "those on the HAITI thought the single blast they heard was a fog signal"—which in fact it was—is equally clear.[30] Application of the Second Circuit rule that engines must be immediately stopped on hearing something ahead that is even suspected to be a fog whistle would plainly have condemned the HAITI VICTORY here.

Similarly, in *The Silver Palm*, 94 F.2d 754, the USS CHICAGO was proceeding at 18 knots between two fog banks when she heard the fog whistle of another ship forward of her beam. She thereupon reduced speed to about 12 knots which she maintained for about one minute before her engines were stopped—a delay again approximating that of the HAITI VICTORY. She was condemned by the Court of Appeals for the Ninth Circuit, *inter alia*, for failing to stop her engines immediately upon hearing the fog whistle. The court made it very plain that at least in that circuit Article 16 requires engines to be stopped at once—"instanter"—

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[29] Hanczyk, Tr. 79, 80, 89; Lyden, Tr. 107; Morris, Tr. 149; Taylor, Tr. 193, 201.

[30] The HAITI VICTORY's pilot admitted that he thought that the whistle he heard was "most probably a fog signal" (Morris, Tr. 151, 152), and that between the time he heard the whistle and looked at the radar he was convinced he was running along a fog bank (Tr. 143). Her second mate also admitted that he had noted visual indications of fog immediately after receiving the report of the DUKE's whistle (Taylor, Tr. 194), and he, like the pilot, surmised that the whistle was a fog whistle (Tr. 209, 219-20).

and not after a while:

> "No command is more imperative on a steam vessel proceeding in the fog than that instanter on her hearing the whistle of a concealed vessel forward of her beam, the engines shall be stopped" (94 F.2d at 761).

No suggestion was made by either court below that the HAITI VICTORY in these proceedings made any effort to meet the burden of showing that her failure to stop her engines for almost a full minute did not contribute to the collision. Such an effort would obviously have been fruitless, since at 17 knots she moved through the water a distance of some 1,700 feet in the time lost by the delay (as compared with only 600 feet in the *Johnston-Warren* case.) Had she been only a fraction of this distance further back on her track, the DUKE OF YORK would obviously have cleared ahead of her, and the collision would have been avoided. Compare also *The Suffolk*, 258 Fed. 219 (2d Cir. 1919); *New York & Cuba Mail S.S. Co. v. United States*, 16 F. 2d. 945 (2d Cir. 1927), cert. denied, 274 U.S. 753. This question is academic, however, since under the *Pennsylvania* rule the HAITI VICTORY had the burden of affirmatively showing that her failure to stop engines promptly "could not have been" one of the causes of the collision, and there was neither a finding nor evidence to this effect.[31]

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[31] The District Court properly determined that "no fault is found in the engine or wheel movement of either vessel after they became aware of each other. Agony of collision was upon them and avoidance was then impossible" (Appendix, p. 5). This finding obviously—and necessarily—referred to the situation from the time the DUKE was first seen by the HAITI VICTORY shortly after 0415 hours, and was apparently so interpreted by the Court of Appeals below.

The decision of the court below, exonerating the HAITI VICTORY in spite of a plain statutory fault contributing to the collision, should accordingly be reviewed and reversed. If it is allowed to stand, different standards of maritime conduct will be applied in the different circuits, and doubt and confusion will have been injected into what has heretofore been a straightforward and simple principle.

CONCLUSION

Each of the several issues presented by the decision below is believed to involve a question of admiralty jurisprudence or procedure which is of such importance that it should be settled by this Court. In addition, the decision on each of these issues collides squarely or at least is on a collision course at close quarters with decisions of other courts of appeals and, with respect to the HAITI VICTORY's violation of Article 16, is in conflict with important principles laid down by this Court as well. It is accordingly urged that a writ of certiorari to review the decree of the court below should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

Admiralty 7622

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Following the collision of the USNS Haiti Victory with the SS Duke of York in the North Sea, the United States filed here a petition for exoneration from or limitation of liability. British Transport Commission, the owner of the Duke of York, has filed a claim for the collision damage to that vessel. Other claimants, including the personal representatives of passengers killed in the collision, seek to implead, under Admiralty Rule 56, the British Transport Commission as an additional party defendant to their claims against the United States, laying contributive negligence to the Duke of York. The Commission excepts to the impleader.

The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. *Hartford Accident Co.* v. *Sou. Pacific* (1926) 273 U.S. 207; *Just* v. *Chambers* (1941) 312 U.S. 383, 386. No case has permitted the impleading of one co-claimant by another. In The Clio-The Springhill, 1948 A.M.C. 75-77, Judge Knox permitted the original petitioner to implead a third-party defendant, but the latter was a claimant in the concourse, and the impleader was simply a counter or otherwise defensive move of the petitioner in respect to that claim.

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary en-

trance. *Department of Highway* v. *Jahncke Service* (1949) 5 Cir. 174 F.2d 894 sustains this position. Although the impleaded party was not already in the cause, the same principle there enforced governs here.

Denial of the instant motion will be based upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other.

(S). ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.
July 2nd, 1954.

* * * * * *

Admiralty 7622

[Caption Omitted]

William B. Eley, Administrator of the Estate of Dale M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen, and certain other claimants, having filed motions for leave to file petitions herein under the 56th Rule in Admiralty impleading a co-claimant, British Transport Commission, as owner of the SS DUKE OF YORK, and British Transport Commission having objected thereto on the ground that said claimants have no right to implead the said Commission herein;

And an order having been entered in this Court on May 3, 1954, reserving the objections of the British Transport Commission for hearing and determination, and ordering further that meanwhile, and subject to the further order of this Court, leave be granted to said claimants to file their petitions herein;

And this Court, after hearing the arguments of proctors, having filed a memorandum, dated July 2, 1954, denying the motions upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other;

And Juliet R. Chamberlain having moved this Court to file an amended impleading petition against British Transport Commission, to which said Commission has objected upon the ground that said claimant has no right to implead the said Commission herein;

Now, on motion of McNutt & Nash, Esquires and Baird, White & Lanning, Esquires, proctors for the British Transport Commission, it is

Ordered:

1. That the petitions of William B. Eley, Administrator of the Estate of Dade M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen and any and all other claimants herein who may have filed petitions to implead British Transport Commission under the 56th Rule in Admiralty pursuant to the order of this Court dated May 3, 1954, or otherwise, be and they are hereby dismissed, to which ruling each of said impleading petitioners excepted as did also the United States.

2. That the motion of Juliet R. Chamberlain to file an amended impleading petition be and it is hereby granted, but the said amended petition is now dismissed, to which ruling the said Juliet R. Chamberlain excepted.

(S.) ALBERT V. BRYAN,
United States District Judge.

Richmond, Va.
May 12th, 1955.

APPENDIX B

Memorandum by the Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

Admiralty 7622

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Just before dawn in the North Sea on May 6, 1953, the USNS HAITI VICTORY, headed for Bremerhaven, and the westbound S.S. DUKE OF YORK, an overnight ferry between the Hook of Holland and Harwich, England, collided. The DUKE OF YORK had just emerged from a fog, the HAITI VICTORY was running in clear weather. Minor damage was suffered by the HAITI VICTORY, but her stem so deeply knifed into the port side of the DUKE OF YORK, just forward of her

bridge, that the entire bow of the latter fell off and sank. Several of her 437 passengers were killed, others injured, and a large number lost their personal baggage. As owner of the HAITI VICTORY, the United States of America has filed a petition for exoneration from or limitation of liability. The question is whether either or both vessels failed to observe the care and caution enjoined upon mariners, by seamanship and statute, for the prevention of collisions at sea.

Asking $1,500,000 for her damage, the British Transport Commission, operating the DUKE OF YORK in connection with the British railway system, has led in the effort of the claimants to lay responsibility for the accident to the HAITI VICTORY. Petitioner's right to limitation, as well as the limitation fund of $1,039,959.52, has been established without contest. Certain claimants sought, through impleading petitions, to assert and try in this proceeding the liability of the British Transport Commission to them; the attempts were rejected and the immunity of the Commission thereto in the present forum was sustained. Ascertainment of the quantum of damages has been deferred in each instance to the determination of liability.

The DUKE OF YORK, a twin-screw steam turbine oil burner, 339 feet in length, left the Hook of Holland bound for Harwich a few minutes after midnight May 5, 1953 (early morning of May 6). She had a maximum speed of 18-20 knots and the crossing was normally a matter of five hours. Her lane was slightly south of due west—W. ¼° S., 267° magnetic—and took her about a mile south of Galloper Lightship, located off the English coast some distance north of the Thames' mouth. The Hook and Harwich are nearly on the same parallel, a little below the 52nd N. The DUKE was showing all required navigation lights—two steaming lights forward, masthead and mainmast, a stern light, and red and green side running lights. Her equipment included radar, but the instrument failed before the ship was twenty minutes out. In addition to her regular officer complement, she carried a Dutch pilot all the way across.

The HAITI VICTORY is a single-screw propeller, of the Victory ship type, 439 feet in length and equipped with radar. She took on a licensed British pilot at Dover just after 0117 British Summer Time, which was one hour ahead of Greenwich Mean Time and is the time of the references herein. Up to Galloper Lightship her course was generally 022° at first, and then 024°, gyro. Passing on her port hand

the South and East Goodwin Lightship enroute, she came abeam of Galloper at about 0414 BST. After an alteration of her course to 050° gyro, to go under the stern of a crossing vessel, when 1½ miles to the east of Galloper, the HAITI VICTORY settled on a firm course of 036° gyro. She was maintaining her maximum speed, 17-18 knots, and was showing all requisite lights.

The HAITI VICTORY's first notice of the DUKE's presence was the latter's fog whistle just after 0414 hours. It was caught by the HAITI VICTORY's forward lookout, and immediately reported to the bridge, as being off the starboard bow. Her pilot had heard it too. Instantly he passed to the starboard door of the wheelhouse, scanned the darkness from bow to beam, saw nothing and went directly to the radar. It disclosed a target on his starboard bow. Going again to the starboard wing of the bridge and again seeing nothing, he at once stopped his engines—0415 hours. Within a moment the red light of the DUKE appeared on his starboard bow but ½ mile off; thereupon the HAITI's rudder was put Hard Right, her engines Full Astern, and her whistle given a short blast. At 0416 the ships were together.

Aboard the DUKE, the captain heard a whistle four or five points on her port bow—the blast of the HAITI as she went Right Rudder and Full Astern. About the same time his forecastle-head lookout shouted his observation of the HAITI's masthead light, as well as her green light, ¼ mile away, about 6 points on the port bow. While taking a "fix" from the Decca dials in the wheelhouse, the DUKE's second mate heard the lookout's call, and running out on the port wing picked out the HAITI's green light with his binoculars, his radar being inoperable. At once the master put the DUKE's engines on Slow, manually sounded a prolonged blast on her whistle, and followed it with Full Astern and 3 short blasts. Collision ensued.

The collision was two miles east of Galloper. The prow of the HAITI VICTORY penetrated the port bow of the DUKE OF YORK on the foreside of her bridge. The HAITI VICTORY puts the time at 0416, the YORK at 0418 hours. No fault is found in the engine or wheel movements of either vessel after they became aware of each other. Agony of collision was upon them and avoidance was then impossible. Existence or absence of earlier fault becomes a question of whether for the weather then prevailing the conduct of either vessel constituted negligence in navigation; there-

fore, the primary and crucial inquiry is what was the weather as known, or as it ought to have been known, to the two navigators.

A meteorological cold front was moving over the North Sea, from northeast to southwest, on the very early morning of the collision, May 6, 1953. It seemed to be pivoting on a point to the north of the east coast of England. By illustration, at midnight, GMT, along the English coast the weather was favorable, and was as favorable along the European coast as far north as the Hook of Holland; from midnight until 4 o'clock A. M. BST it moved southwardly 60 miles along the Dutch coast, but only 20 to 30 miles along the English shore. As a "weak" front it included only drizzle, overcast and fog with very poor visibility. At 4 o'clock BST it was still 60 miles northeast of Galloper, but twice as far down the European coast as on the opposite coast. From 4 o'clock until 7, it was almost stationary on the English side, leaving fair visibility there, but the night was dark. In and around Galloper the weather at 0300 hours was "cloudy with wet dew", meaning on Galloper's log legend that the moon or stars would be visible at times. Fog signals were not commenced by Galloper until 0445 (the collision was at 0416 or 0418) and not until 0600 was it overcast and misty at Galloper. "Misty * * * is not quite as thick as [fog] but enough to cause objects to be indistinct and to require the fog signal to be sounded." The frequency of the fog and the low visibility increased from Galloper toward the Dutch coast.

From the time the DUKE left the gas buoy, the first sea point, off the Hook of Holland, she met fog. As early as 12:45 A. M., less than an hour after leaving the docking pier, her captain was called to the bridge on account of the fog. At Noord Hinder Lightship, off the Dutch coast and 9 miles south of the DUKE's track, the log records, the weather as foggy from one A. M. to five. The DUKE was running through a "patchy" fog—"very thick at times" and then fairly clear intervals. She was piercing one fog bank after another. Fog signals from the vessel's steam whistle were sounded continually. From 3 A. M. on, the fog was "very thick". This is the testimony of the DUKE's crew. The fog pocket she transited immediately before the collision was apparently the westernmost in her course.

In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the "moderate speed"

injunction in the fog rules of Article 16, International Rules, 33 USCA 145n. It was an overriding and major fault; collision was a foreseeable result. Enveloped repeatedly throughout her passage in a fog that severely cut visibility, a fog that rendered her invisible, she nevertheless assumed and kept to her clear weather speed—she reached Galloper at her regularly scheduled hour. When on the bridge at 12:45 A. M., the captain reduced the engines to Half Speed, 12 knots, but within a few minutes he put them back on Full Speed, 18 knots, and returned to his cabin, evidently satisfied with the visibility. Never was visibility greater than 1 or 2 miles. From 0053 until 0325 hours her engines were at Full Speed Ahead. Twenty-four miles east of Galloper, 0325, visibility was shorter than a mile; by 0412, six minutes before the collision, it was less than half a mile; but during this period, save for a minute, her speed was 16 knots, Standby Full Ahead. At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots.

Obviously, too, the DUKE was not conforming to the authoritative interpretation of Article 16—that speed in a fog shall not exceed a rate that would allow her, with the assistance of her engines, to come to a standstill before she would collide with another vessel that she should see. The Lawrence, 1893, 4 cir. 54 F. 542-544; The Silver Palm, 1937, 9 cir. 94 F. 2d 754, 757; Griffin on Collision, p. 292 et seq.; The Fjell, 1919 E.D. Va. 257 F. 478,480, opinion by Judge Waddill. Indeed, she could not stop in time to allow the bow watch to get below to warn his companions. That 12 knots in a fog of ¼ mile visibility is in fact an immoderate speed seems manifest; that it is so in law is well precedented. Griffin on Collision, p. 301, footnote 1.

As to fault in the HAITI VICTORY, decision depends on whether she knew or ought to have known that she was running into or alongside a fog bank. If she had such knowledge, actual or attributable, and if the fog rules bind a vessel approaching or running alongside a fog, she was at fault; for she was proceeding at full speed, 17-18 knots, and was taking no fog precautions. But the Court finds that she was neither in a fog nor chargeable with notice of the nearby fog patch. It cannot be successfully argued

that, with the DUKE so near, the HAITI VICTORY must necessarily have been aware of the fog enshrouding the DUKE. The evidence denies any such deduction. The fog cloaking the DUKE hid her as effectively as it hindered her; and all the while remained imperceptible to the outsider.

As the HAITI left Dover, visibility was excellent, so clear that the radar was soon switched off. Lights were distinct on both sides of the Channel, ahead and astern. One vessel was overtaken on the way, readily discernible. At 0400, Galloper was easily picked up one point on the port bow. Just before the HAITI came abeam of Galloper, still another vessel was seen, running from Goeree Lightship on the Holland coast and a little south of the Hook, to Harwich. The HAITI VICTORY altered her course to 050° to give way to the crossing vessel, went around her stern, and resumed her plotted course on 036°. The crossing vessel, as indicated, came from the east, the very direction from which the DUKE was coming. She was plainly seen when as much as 4 or 5 miles eastward. This was at 0414 hours—2 minutes before the collision. A trawler a mile and a half north of the Duke, and on a parallel course showed no consciousness of any fog. As we have seen, even Galloper did not find it advisable to issue fog signals until 0445; and then it did so not for fog, only for "Cloudy Wet dew." Signs of fog were not seen by the HAITI VICTORY until after the DUKE revealed herself. They were not overlooked; they were not there.

To charge the HAITI VICTORY with knowledge of the proximity of fog, the DUKE called to the stand the mate of the S.S. American, a ship following the HAITI VICTORY up the North Sea. Her course was 034° True. Departing Dover seventeen minutes after the HAITI VICTORY, the mate said he was able at 0425 to see, 8½ miles on his "port head", the Kentish Knock Light located on the English coast; he stated the visibility was 10 miles. His log contains no entry of bad weather between 0236 and 0441. His notation of fog at 0441 corresponds to Galloper's log of fog signals at 0445; but American's record reveals that fog was only setting in at 0441, that not until then were her engines put on Standby, and only at 0450 was her speed reduced because of fog. He states he could not see Galloper until within ½ mile of it at 0506; but his log notes that the American came abeam of Galloper at 0508 with 3 miles visibility. Hence, he gives no proof of fog perception on the English coast as early

as 0416 or 0418—collision times. When 1½ miles passed Galloper, 0512, he saw the DUKE and the HAITI lying alongside each other fore and aft.

True, the HAITI VICTORY's master did not completely undress on turning in, staying ready for any call, including a fog alarm. He testified, too, of the frequency of fogs in the North Sea. But, all of this discloses precaution against fog, not suspicion of it. Of course, he knew that ships traversed the North Sea between the English and Dutch ports; but he had the right to assume that their presence would be announced through the signals, and would be accompanied by the seamanship, demanded by the laws of the sea. Admittedly, as to the westbound traffic he was the burdened vessel, they the privileged; but again their paramount rights presuppose their observance of the law. Failing in this, their priority is forfeited. Specifically, compliance with the fog rule was a prerequisite to assertion of the righthand vessel's crossing privileges.

Strenuous insistence of fault in the HAITI VICTORY is urged for her failure to make use of radar, particularly when the HAITI VICTORY's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the HAITI VICTORY, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the HAITI VICTORY was changing back from her passing course of 050° to the new course of 036°. He did not see the DUKE on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the DUKE was not negligence, for it was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it.

At this point it is well to refer to the DUKE's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the DUKE OF YORK's excessive speed was the predominant fault leading to the collision, it is not necessary in this

case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence.

This memorandum is adopted by the Court as its findings of fact and conclusions of law. Within 10 days proctors for the United States will present a decree in accordance therewith, exonerating the petitioner, after submitting copies to the claimants' proctors for consideration as to form.

(Sgd.) ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.
May 5th, 1955.

FINAL DECREE OF EXONERATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA AT NORFOLK

Admiralty 7022

In the Matter of the Petition of the United States of America, as Owner of the USNS HAITI VICTORY, for Exoneration from or Limitation of Liability

The petition of the United States of America as owner of the USNS HAITI VICTORY for exoneration from and limitation of liability having come on for trial on the pleadings and proofs of the petitioner and of the said claimants and having been argued by the advocates of the respective parties;

And the Court having filed its decision that the collision and the loss, destruction, damage and injury arising therefrom were not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY, and that the petitioner was entitled to exoneration from liability, as appears by the opinion on file;

Now, on motion of L. S. Parsons, Jr., United States Attorney, proctor for the petitioner, it is

ORDERED, ADJUDGED AND DECREED,

That the collision described in the libel and petition was not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY;

And that said petitioner is entitled to exoneration from liability;

And that said petitioner be and hereby is forever exempted and discharged from all loss, damage, destruction or injury arising from or growing out of the said collision.

ALBERT V. BRYAN,
U. S. District Judge.

Alexandria, Virginia,

June 2, 1955

No objection as to form

Edwin Longcope,
Baird, White & Lanning,
Hughes, Little & Seawell,
Jett, Sykes and Howell,
Vandeventer, Black & Meredith,
John W. Oast, Jr.,
David H. Batchelder, Jr.,
Earl M. White,
C. Lydon Harrell,
Roger Brooks,
John P. Parrish.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION, ET AL., APPELLANTS,

versus

UNITED STATES OF AMERICA, as owner of the USNS HAITI VICTORY, petitioning for exoneration from or limitation of liability in a cause of limitation of liability, civil and maritime, APPELLEE.

Appeals From the United States District Court for the Eastern District of Virginia, at Norfolk.

In Admiralty.

(Argued January 7, 1956. Decided February 13, 1956.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Edwin Longcope (Baird, White & Lanning; McNutt & Nash, and Edward R. Baird on brief) for Appellant, British Transport Commission; Wilbur E. Dow, Jr., (John W. Oast, Jr., David H. Batchelder, Jr.; Dow & Symmers; Vandeventer, Black & Meredith; Hughes, Little & Seawell; Jett, Sykes & Howell; C. Lydon Harrell, Jr., and Earl W. White on brief) for Appellants, Intervening Claimants; and Thomas F. McGovern, Attorney, Department of Justice, (L. S. Parsons, Jr., U. S. Attorney; Leavenworth Colby, Attorney, Department of Justice, and John M. Hollis, Assistant U. S. Attorney, on brief) for Appellee.

DOBIE, Circuit Judge:

On May 6, 1953, in the very early morning, a collision occurred in the North Sea between the overnight ferry DUKE OF YORK (hereinafter called the DUKE) owned by the British Transport Commission (hereinafter called the Commission), and the transport HAITI VICTORY (hereinafter called the HAITI), owned by the United States. Terrific damage was done to the DUKE, several persons on the DUKE were killed, others were injured and many suffered prop-

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erty damage. The HAITI suffered only minor damages to her bow, amounting to some $60,040.48.

A petition was filed in the United States District Court for the Eastern District of Virginia by the United States, as owner of the HAITI, seeking exoneration from and/or limitation of liability for all losses and damages resulting from the collision. The Commission filed in these proceedings a claim of $1,500,000 for the losses and damages sustained by the DUKE. Numerous death, personal injury and baggage claimants also filed claims in the limitation proceedings, in varying amounts.

Some of the other claimants also filed petitions in the limitation proceedings, seeking to implead the Commission therein under General Admiralty Rule 56. In an unreported memorandum, the District Court held that the other claimants could not implead the Commission, for the reason that a limitation proceeding does not provide a forum for the adjudication of the liability of co-claimants to each other. Accordingly, an order was entered in the District Court dismissing the impleading petitions of these other claimants.

The limitation proceedings were tried in the District Court before Judge Albert V. Bryan. At the trial the right of petitioner, United States, to limit its liability, as well as the limitation fund of $1,039,959.52, was established without contest.

Thereafter, Judge Bryan filed his opinion, (131 F. Supp. 712) in which he held that the DUKE was solely to blame for the collision. The final decree exonerating the HAITI was filed in accordance with this opinion.

The Commission, and the other claimants, have filed appeals from the final decree exonerating the HAITI. The other claimants have also appealed from the order dismissing their petitions to implead the Commission in the government's limitation proceedings.

Two questions are before us on this appeal: (1) Did the District Court commit error in exonerating the HAITI and holding the DUKE solely to blame for the collision; and (2) Did the District Court commit error in dismissing the petitions of the other claimants to implead the Commission in the limitation proceedings instituted by the United States seeking exoneration from, and/or limitation of liability for, losses and damages resulting from the collision.

The fault of the DUKE seems quite clear and is not seriously contested. She had left the Hook of Holland boun-

West for Harwich, England. We quote from the opinion of the District Judge, which finds ample support in the record, (131 F. Supp. 712, 715):

> "The DUKE was running through a 'patchy fog'—'very thick at times' and then fairly clear intervals. She was piercing one fog bank after another. * * * From 3 A. M. on, the fog was 'very thick.' * * * In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the 'moderate speed' injunction in the fog rules of Article 16, International Rules, 33 USCA § 145n. It was an overriding and major fault; collision was a foreseeable result. * * * At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots."

Had the weather been clear and the visibility good all around; under the Starboard Hand Rule, the DUKE would have been the privileged, the HAITI the burdened, vessel. This rule, though, did not apply here by virtue of the fog surrounding the DUKE.

This brings us to the District Court's exoneration of the HAITI, a discussion involving at least three points: (a) Actual or constructive knowledge on the part of the HAITI that she was running into, or alongside, a fog bank; (2) The conduct of the HAITI after the HAITI heard the whistle of the DUKE; (3) The negligent use, or failure to use its radar by the HAITI. A careful study of the record convinces us that we cannot reverse the District Court's exoneration of the HAITI.

Visibility was excellent as the HAITI, with a Trinity House pilot, left Dover, bound for Bremerhaven, Germany. Lights were distinct on both sides of the English Channel. Around 0400 Galloper Lightship was easily picked up by the HAITI, about one point on the port bow. A very short while before the HAITI came abeam of Galloper, a crossing vessel was seen by the HAITI, about 4 miles away. The HAITI altered her course to 050°, went around this vessel's stern and then resumed her plotted course of 036°. This happened about 0414, approximately 3 minutes before the collision, and this crossing vessel came from the East, the direction from which the Duke was coming.

A trawler, about 1½ miles North of the DUKE, and on a course practically parallel to the DUKE, gave nothing to indicate the presence of fog. Galloper gave no fog signals until 0445, and then signalled only "Cloudy wet dew." The collision occurred about two miles East of Galloper. The mate of the S. S. AMERICAN, which left Dover 17 minutes after the HAITI, testified that his log contained no notation of fog until 0444.

Confirmatory testimony to the effect that there was no fog and no signs of impaired visibility apparent to those on the HAITI was given by her bow lookout, her helmsman and her mate. We must, therefore, affirm the holding of the District Court that the HAITI never knew, nor should have known, of the fog which enveloped the DUKE.

This brings us to the conduct of the HAITI just prior to the collision. The first notice those on the HAITI had of the presence of the DUKE was a single blast whistle from the DUKE. The bow lookout of the HAITI promptly reported to the bridge by telephone that he had heard what he thought was a ship's whistle off the HAITI's starboard bow. This whistle was also heard by the helmsman and pilot of the HAITI. The time, then, was apparently about 0414.

The pilot dashed out on the starboard side of the wheelhouse, looked around, saw nothing and went to the radar which disclosed an echo off the starboard bow. He again went out, saw nothing and stopped the engines, around 0415. Those on the HAITI thought the single blast they heard was a fog signal, but they were not sure of this.

Apparently in about a minute, the HAITI pilot saw the DUKE crossing from starboard to port, gave the order hard right, blew one short blast and went full speed astern. The full speed astern was logged on the HAITI at 0415-½, the collision at 0416. The HAITI changed course from 036° to 079° before striking the DUKE. The pilot of the HAITI testified that when he first saw the DUKE looming out of the fog, there was nothing that could be done by the HAITI beyond the hard right and full speed astern. A survey of the deformation of the plates, which is the resultant of the velocities of the ships, showed the speed of the DUKE, at the moment of impact, to be from 2 to 4 times the speed of the HAITI.

Under these facts, we must affirm the holding of the District Court exonerating the HAITI from blame in its con-

duct just before the collision. This includes the contention of the DUKE that the HAITI violated Rule 16 (33 USCA §92):

> "* * *
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

See, THE UMBRIA, 166 U. S. 404; *Johnston-Warren Lines* v. *United States*, 196 F. (2d) 689; *Steffens* v. *United States*, 32 F. (2d) 206; THE ANNA M. FAHY, 153 Fed. 866.

This brings us to the radar question. Since the visibility was good, the radar on the HAITI was switched off to stand by about two hours after the pilot boarded the HAITI. At stand by, no images are visible on the radar screen, but the radar is kept heated and, as the pilot testified, "When you do switch it, it comes on immediately." It was proved that the delicate cavity magnetron of the HAITI radar has a short life, so that the actual use of the radar must be carefully rationed.

Counsel for the DUKE make much of the failure of those on the HAITI to observe the DUKE when, for purely navigational purposes, the radar was switched on as the HAITI neared Galloper and the HAITI mate failed to find the DUKE on the radar screen. On this point, we quote from the opinion of the District Judge, (131 F. Supp. 712, 717):

> "Strenuous insistence of fault in the Haiti Victory is urged for her failure to make use of radar, particularly, when the Haiti Victory's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the Haiti Victory, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the Haiti Victory was changing back from her passing course of 050° to the new course of 036°. He did not see the Duke on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the Duke was not negligence, for it

was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it."

With this, we must concur. See, THE SOUTHPORT, 82 Ll. L. Rep. 862; *United States* v. THE AUSTRALIA STAR, 172 F. (2d) 472, 476, cert. denied 338 U. S. 823; *Wood* v. *United States*, 125 F. Supp. 42, 51; *Pocahontas Steamship Co.* v. THE ESSO ARUBA, 94 F. Supp. 486, aff'd. 197 F. (2d) 422; *Anglo-Saxon Petroleum Co.* v. *United States*, 88 F. Supp. 158; Wylie, Use of Radar at Sea (Institute of Navigation, London, 1953).

As to the defective radar on the DUKE, the District Judge observed, (131 F. Supp. 712, 717):

"At this point it is well to refer to the Duke's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the Duke of York's excessive speed was the predominant fault leading to the collision, it is not necessary in this case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence."

This brings us to the second question before us on this appeal: Did the District Court err in denying the petitions of various claimants to implead the co-claimant, British Transport Commission. This right of impleader is sought under the 56th. Admiralty Rule:

"In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that

such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against: the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

The District Judge stated:

"The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. * * *

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary entrance."

In his opinion, the District Judge cited, with the admission that none of these cases was precisely in point, *Just* v. *Chambers*, 312 U. S. 383, 386; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207; *Department of High-*

ways v. *Jahncke Service, Inc.*, 174 F. (2d) 894; THE CLIO THE SPRINGHILL, 1948 A. M. C. 75.

This appears to be a question of first impression. While there have been cases involving the right of a petitioner in a limitation of liability proceeding to implead a claimant therein and the right of a claimant or a petitioner to bring in a third party, there have been no cases that involve the precise issue here involved: Whether one co-claimant in a limitation of liability proceeding can implead another co-claimant under the provisions of the 56th. Admiralty Rule.

We advert briefly to the cases cited in the District Judge's opinion. In The Hartford Accident and Just cases, *supra*, the Supreme Court held that when the jurisdiction of the court of admiralty has attached through a petition for limitation, the jurisdiction to determine liability is not lost merely because the shipowner fails to establish his right of limitation, and the claimants will be furnished a complete remedy by distribution of the *res* and by judgments *in personam* for deficiencies against the owner. In the Department of Highways case, *supra*; the impleading petition was denied, but, in that case, it was a third party that was sought to be impleaded rather than a co-claimant which was before the court and thus subject to the court's jurisdiction, as is the Commission in the instant case. In the CLIO SPRINGHILL case, *supra*, the impleading petition was granted, but the party seeking the impleading petition was the petitioner in the limitation of liability proceeding.

Though the question is close and not free from difficulty, we think the District Court erred in denying these impleading petitions, which should have been granted. While a hardship might thereby be suffered by the Commission, it would be an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings. Here we have many claimants from many parts of the world, who have filed their claims in the limitation proceedings instituted by the United States. All of the evidence concerning the collision involved herein has been presented both by petitioner and the claimant, British Transport Commission. The merits of the case have been adjudicated and it would work an undue hardship on all of the claimants herein not to have their rights against the British Transport Commission settled at this time. To hold otherwise would mean that the various claimants would have to pursue their causes of action against the Commission in

another forum at great expense and at a time when perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time.

As a practical matter as well as an equitable one, the claimants herein should be allowed to implead the Commission. The Court (United States Court of Appeals, Second Circuit) in *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corporation*, 86 F. (2d) 708, stated that a determination in a limitation of liability proceeding will be *res adjudicata*. This position is also supported by THE ADAH, 258 Fed. 377, wherein the same court stated that all parties to a proceeding for limitation of liability who appear voluntarily or otherwise and join issues with the petitioners and between themselves are bound by the decree. Thus, if the issue of liability in the instant case is *res adjudicata* and all the parties herein bound thereby, then the District Court should also decide the issue of damages as between all the parties before it and this could only be accomplished by the allowance of an impleading petition under the 56th Admiralty Rule.

It has often been said that admiralty courts sit as courts of equity. Certainly wide acclaim has been lavished on the delight of equity in doing complete justice to all the parties before it and here the Commission was before the court. This view was admirably stated by Chief Justice Taft in the Hartford Accident case, 273 U. S. 207, 215-216:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the case with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. * * * The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many-cornered controversy."

This equitable principle was stated and applied by the Supreme Court in the case of *Alexander* v. *Hillman*, 296 U. S. 222, which was an equity suit brought by receivers of a corporation for the purpose of winding up the affairs of

the company and the disposition of its assets. Certain officers of the corporation, who were not served with process, appeared as respondents and presented their claims. The receiver of the company then filed various counterclaims against the officer-respondents and prayed for affirmative relief against them. This affirmative relief was allowed. Said Mr. Justice Butler, 296 U. S. 222, 239, 241-242:

> "Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them.
>
> * * *
>
> Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."

The directors were required, at the risk of forfeiting their rights, to comply with the invitation and order of court, and present their claims in the receivership proceeding. See, also, the opinion of Circuit Judge Parker, (citing *Alexander* v. *Hillman*) speaking for our Court in *Florance* v. *Kresge*, 93 F. (2d) 786.

It is contended by counsel for the DUKE that limitation proceedings in admiralty are distinctive and statutory, that they are *sui generis* and quite unlike suits in equity or ordinary civil actions in admiralty. It is said they are neither proceedings *in rem* nor *in personam*. Accordingly, we are told, admiralty courts in such unique and peculiar proceedings should not apply the usual doctrines of equity or admiralty. This technical contention leaves us rather cold. It does not wean us from the liberal view we have reached.

Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a

single legal proceeding; (2) parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th Admiralty Rule. Certainly that spirit finds support in the Federal Rules of Civil Procedure.

The decree of the District Court, in so far as it exonerates the HAITI and holds the DUKE solely responsible for the collision, is affirmed. That part of the decree which denies the impleading of the Commission by the other claimants in the limitation proceeding is reversed. And the case is remanded to the District Court for further proceedings in conformity with the opinion.

Affirmed in part; Reversed in part and Remanded.

DECREE.

Filed and Entered February 13, 1956.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION AND CARL LUDWIG ABENDROTH, EMANUEL PHILIP ANHOLT, MATTHEW WILLIAM BAILEY, WILLIAM H. BAKER, M. J. BALL, WILLIAM H. BARKER, DONALD STANLEY, JOHN BELLAMY, RAF, CAHN & BENDIT, LTD., ALISTAIR A. CAMERON, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, as owner of the USNS HAITI VICTORY, petitioning for exoneration from or limitation of liability in a cause of limitation of liability, civil and maritime, APPELLEE

APPEALS FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court entered June 2, 1955, appealed from in this cause be, and the same is hereby, affirmed; that the order of the said District Court entered May 12, 1955, appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings in conformity with the opinion of the court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

(9795-6)

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FILED
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No. 247

Supreme Court of the United States

OCTOBER TERM, 1956

THE BRITISH TRANSPORT COMMISSION,
Petitioner,
v.
UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE BRITISH TRANSPORT COMMISSION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE BRITISH TRANSPORT COMMISSION, PETITIONER

Both this Petition—No. 247—and the Petition for Certiorari filed by Arthur Goodman, et al. in No. 249 seek review of the same decision of the Court of Appeals for the Fourth Circuit (Pet. Appendix, p. 12, 230 F.2d 139). Petitioners in No. 249 were passengers aboard the British Transport Commission's vessel, the S.S. DUKE OF YORK. In substance, they join with us in seeking review of our second and third "Questions Presented" (Pet. p. 3), arising out of the exoneration by the court below of the U.S.N.S. HAITI VICTORY. They oppose, however, the granting of certiorari on our first Question—whether they, as other claimants in the HAITI VICTORY's limitation proceeding, may implead

the British Transport Commission under Admiralty Rule 56. The Government, Respondent in both No. 247 and No. 249, has filed briefs opposing the grant of certiorari on all issues in both cases.

The British Transport Commission respectfully urges that this Court should review all three Questions Presented by the decision below (Pet. pp. 2-3).

I

Both the Government's brief in opposition (pp. 10-15) and that filed by the passenger claimants oppose review by this Court of the question of the propriety of impleader of the Commission by other claimants in this limitation proceeding. Both briefs argue primarily the merits of the decision below on this question, and both of them confuse the admiralty practice with respect to cross-libels in ordinary suits *in rem* or *in personam* with the applicability of the third-party practice under Rule 56 to co-claimants in a limitation of liability proceeding.[1] At this stage, however, further discussion of this would not be profitable. For present purposes the simple answer to these arguments is that the decision below is in conflict with the decision of the

---

[1] The brief for the passenger claimants erroneously refers to the question as involving a "cross-libel". In fact, the question is only one of the propriety under Admiralty Rule 56 of *an impleading petition by a co-claimant in a limitation proceeding.* It should also be noted that, since the Government—the limitation petitioner—never joined with the passenger claimants in filing impleading petitions against the Commission, it is not now properly before this Court on this issue. Its filing of a cross-libel in the District Court, following the decision below, presents a related but different question which has not yet been passed upon by either the District Court or the Court of Appeals, and is obviously not ripe for determination by this Court. See our Petition, pp. 15-17.

Fifth Circuit in *Department of Highways* v. *Jahncke Service*, 174 F.2d 894 (1949).

The Government in its brief in opposition here understandably, if weakly, tries to distinguish the *Jahncke* case. It argues (p. 14) that there the person attempted to be impleaded by a claimant in a limitation proceeding was not already a party to that proceeding, while here such person was also a claimant already in the proceeding. Neither the history nor the language of Rule 56, however, would support this distinction; in fact the specific provisions of the Rule make it plain that it was intended to be used ordinarily, if not primarily, to bring in third persons not already parties to the proceeding,[2] as was sought to be done in the *Jahncke* case. If the third party practice provided by Rule 56 is available to a claimant in a limitation proceeding to bring in a co-claimant (as the court below held), it must equally be available to him, upon proper service, to bring in a third party who may also be liable (contrary to the decision of the Court of Appeals for the Fifth Circuit). As the court said in the *Jahncke* case,

> ". . . a consideration of the origin, nature and purpose of a limitation of liability proceeding and of the origin, nature and extension of the third party practice under original Admiralty Rule 59, now Rule 56, leaves us in no doubt of the correctness of appellee's contention" (174 F.2d at 895).

---

[2] After providing for the filing of a third party petition by the claimant of a vessel in a suit *in rem* or by the respondent in a suit *in personam*, it provides:

> "Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against . . ." (Pet. p. 4).

That the *Jahncke* case if followed would be determinative here was recognized by the District Court, which stated specifically that "the same principle there enforced governs here" (Pet. Appendix, p. 2). Circuit Judge Lumbard sitting in Admiralty in the Southern District of New York in *New Jersey Barging Corp.* v. *T. A. D. Jones Co.*, 135 F.Supp. 97, 99 (1955) similarly cited the *Jahncke* case as controlling in holding that a limitation petitioner may not implead *a claimant in that proceeding* under Rule 56. Furthermore, in the *Jahncke* case itself the Court of Appeals for the Fifth Circuit cited an earlier decision in the Southern District of New York similarly denying a limitation petitioner the right to implead *a claimant in that proceeding* (*Petition of Texas Co.*, 81 F.Supp. 758) as in accord with its decision (174 F.2d at 895). And, finally, the passenger claimants in their brief in opposition in this Court have tacitly recognized that the *Jahncke* case is squarely opposed to the decision below. In contending (erroneously, as we believe) that the filing of a claim in a limitation proceeding is the practical equivalent of the filing of a libel, they note that "the learned District Judge as well as the Court of Appeals for the Fifth Circuit on whom he relied, see *Department of Highways* v. *Jahncke Service*, 174 F.2d 894 (1949), failed to make this distinction."

Accordingly, it is submitted that the question of the proper interpretation of Admiralty Rule 56 should be reviewed by this Court in order to eliminate a clear conflict among the circuits on this important question of Admiralty practice.

II

The Government seeks to dispose of the serious questions of law arising out of the exoneration of the HAITI VICTORY by characterizing this as a mere decision of fact. While a determination of liability or exoneration in a collision case, like a determination of seaworthiness, may under some circumstances be essentially a finding of fact, not appropriate for review by this Court, it may in other cases present a genuine and important conclusion of law. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99. Here the decision exonerating the HAITI VICTORY on simple and undisputed findings of what happened, and when, presents important questions of maritime law in a new and increasingly vital area, and applies the International Regulations for Preventing Collisions at Sea inconsistently with their accepted application in other circuits.

Contrary to the Government's characterization, Petitioner here is not attempting to undercut the lower court's findings that the HAITI VICTORY had no reason actually to know of the existence of the nearby fog bank which hid the DUKE, nor does it follow from Petitioner's position that any ship at any place on the high seas must operate her radar whenever darkness falls. No such issue is presented on the findings here. Petitioner urges only that a ship equipped with fully operative radar, proceeding at high speed through what are known to be heavily traveled waters and at a crossroads of marine traffic, on a dark and overcast night with no horizon visible, must under the General Precautionary Rule (Article 29) take the minimal precau-

tion of periodically using her radar lookout in order to guard against unseen (and, by the human eye, unseeable) fog banks and approaching ships or other dangers hidden by them. Far from discounting the importance of full and proper utilization of radar, as suggested by the Government (p. 8, n. 3) the recent ANDREA DORIA disaster serves to underline the necessity for an authoritative determination by this Court of the responsibilities imposed upon the steadily increasing number of seagoing vessels equipped with this great anti-collision detection instrument.

III

The Government attempts to dispose summarily of the HAITI VICTORY's plain violation of the mandate of Article 16—that upon hearing a fog whistle forward of her beam a vessel shall at once stop her engines—by cavalierly disregarding and even misstating the concurrent findings of both lower courts. Thus, without giving the time the whistle was heard, the Government states (p 4) that the pilot "immediately (at approximately 4:15 a.m.) stopped the HAITI's engines". Even more seriously, it makes the extraordinary statement (at p. 9) that the HAITI's pilot "in stopping the vessel's engines within a matter of seconds after the whistle was heard" complied with Article 16.

The concurrent findings of the two courts below are as binding upon the Government as they are upon Petitioner. The District Court found that the HAITI's fog whistle was heard "just after 0414 hours" by both the lookout and the HAITI VICTORY's pilot. He stopped his engines at "0415 hours". The minute he wasted was spent in futilely gazing into the darkness, in going to

the radar where he saw the DUKE on his starboard bow and then in going back to the wing of the bridge to gaze into the darkness again, all before stopping his engines (Pet. Appendix, p. 5).

The Court of Appeals similarly found specifically that the whistle was heard off the starboard bow at "about 0414" and that the engines were stopped "around 0415" (Pet. Appendix, p. 15). This can hardly be characterized as "a matter of seconds". As set forth in more detail in our Petition (pp. 42-45), a comparable delay of one minute was held inexcusable by the Second Circuit in *Johnston-Warren Lines* v. *United States*, 196 F.2d 689 (1952) and by the Ninth Circuit in *The Silver Palm*, 94 F.2d 754, 761 (1938). Unless this Court reviews this decision, the lower courts will be hopelessly confused with respect to the proper interpretation of one of the most important provisions of the International Regulations for Preventing Collisions at Sea.

Respectfully submitted,

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OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION, PETITIONER,

v.

UNITED STATES OF AMERICA, as Owner of the U.S.N.S. Haiti Victory, et al., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION,
Petitioner,
v.
UNITED STATES OF AMERICA, as Owner of the U.S.N.S. HAITI VICTORY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Court's memorandum opinion and order holding that petitioner could not be impleaded by other claimants under Admiralty Rule 56 (R. 58-59) is not reported. The same court's memorandum opinion exonerating the United States, as owner of the HAITI VICTORY, from liability adopted by the court as its findings of fact and conclusions of law (R. 64-71) is reported at 131 F. Supp. 712. The opinion of the United States

Court of Appeals for the Fourth Circuit (R. 77-88) is reported at 230 F. 2d 139.

JURISDICTION

The action is one in admiralty, originated by petition of the United States, as owner of the U.S.N.S. HAITI VICTORY, seeking exoneration from or limitation of liability arising out of a collision in 1953 in the North Sea between the HAITI VICTORY and the S.S. DUKE OF YORK, owned and operated by petitioner.

The decree of the United States Court of Appeals for the Fourth Circuit was entered on February 13, 1956 (R. 88-89). On April 10, 1956, the time for filing a petition for writ of certiorari was extended to and including July 12, 1956 by an order signed by the Chief Justice. The petition for a writ of certiorari was filed on July 11, 1956, and, limited to the question set forth below, was granted on October 8, 1956. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The United States, as owner of a vessel which rammed the British Transport Commission vessel DUKE OF YORK in the North Sea, brought limitation of liability proceedings in the District Court. In accordance with Admiralty Rule 51, all persons having claims against the United States arising out of the collision were admonished to file them in this proceeding. Accordingly, the British Transport Commission, whose vessel was badly damaged by the HAITI VICTORY, filed its claim. The question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision.

STATUTES AND RULES INVOLVED

Sections 183(a) and 185 of Title 46, United States Code, and Admiralty Rules 51, 53 and 56 are set out in the Appendix, *infra*, pp. 44-50.

STATEMENT

On May 6, 1953, in the North Sea, the Naval Transport HAITI VICTORY, owned by the United States, rammed the overnight channel ferry DUKE OF YORK, owned by the Transport Commission. The bow of the HAITI VICTORY knifed so deeply into the port side of the DUKE OF YORK just forward of her bridge that the entire bow of that vessel broke away and sank. Several passengers on the DUKE OF YORK were killed, others were injured, and a large number lost their baggage. The HAITI suffered only minor damage to her bow.

The United States as owner of the HAITI VICTORY filed a petition in the United States District Court for the Eastern District of Virginia under the Federal Limitation of Liability Statute (Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) and Admiralty Rule 51, seeking exoneration from or limitation of liability for all losses and damages resulting from the collision. Petitioner filed in this proceeding a claim of $1,500,000 for the losses and damages sustained by its vessel, the DUKE OF YORK. A number of death, personal injury, and damage claimants also filed claims in varying amounts.

Some of these claimants then filed petitions in this case to implead petitioner, under the alleged authority of General Admiralty Rule 56. The District Court denied these impleading petitions, holding that other claimants could not implead petitioner for the reason that a limitation proceeding does not provide a forum for the adjudication of liability of claimants to each

other (R. 58-59). Then, after a trial, the District Court held that the DUKE OF YORK was solely to blame for the collision, and a final decree exonerating the HAITI VICTORY was filed in accordance with this opinion (R. 73-74).

On appeals by all parties, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court exonerating the HAITI VICTORY and holding the DUKE OF YORK solely responsible for the collision. But it reversed the District Court's order denying the right of other claimants to implead petitioner under Admiralty Rule 56. While noting that the issue appeared "to be a question of first impression," the Court of Appeals held, largely in reliance upon analogies drawn from receivership proceedings, that impleader of petitioner was proper under the Admiralty Rules. It accordingly remanded the cause to the District Court for further proceedings (R. 88-89).

The United States did not join with other claimants in attempting to implead petitioner in the District Court, although it filed a "cross assignment of error" on the appeal to the court below, stating that "the District Court erred in denying to claimants and to petitioner the right to cross-claim and implead the owners of the S.S. DUKE OF YORK". On remand to the District Court, following the decision of the Court of Appeals, the United States filed a so-called "cross libel" against petitioner, attempting to obtain service on petitioner by serving its proctors in this proceeding. Petitioner has moved to quash service of this cross libel and has also filed exceptions to it. Thus no claim or right of the United States has been passed upon by the courts below, and no such claim or right is now before this Court. The question which *is* before this Court is the right of Arthur Goodman and other co-claimants

with the Transport Commission in the HAITI VICTORY's limitation proceedings to implead the Transport Commission under Admiralty Rule 56.

SUMMARY OF ARGUMENT

I

Impleader under Admiralty Rule 56 is here sought as a means by which Transport Commission, a claimant in a limitation of liability proceeding not otherwise subject to the jurisdiction of the court, can be held to answer claims against it by co-claimants in that proceeding. The history, purpose and wording of Rule 56 combine to show that it is not, and was not intended to be, a means of fusing into the special and limited procedure by which the limitation of the liability of a shipowner is established and claims against him marshalled, determined and satisfied, a wholly separate proceeding involving controversies between co-claimants.

The principles of limitation of liability were established by statute in 1851, and appropriate procedures were specified by the court in the Admiralty Rules. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578-590. Rule 56 is later in origin and rooted in different considerations. As first adopted in 1883 (as Rule 59) it made generally applicable the rule of *The Hudson*, 15 Fed 162 (S.D. N.Y. 1883), permitting the joinder by one vessel which is libeled in a collision case of another vessel alleged to be also at fault in a collision case. Later decisions in other types of libel proceedings permitted the respondent, if the action were *in personam*, or the claimant of the vessel proceeded against if the action were *in rem*, to bring in third parties upon allegation of fault or negligence. This practice was in turn embodied in the revision of the Admiralty Rules

in 1920, when Rule 59, as revised, became the present Rule 56.

Moreover, Rule 56, written to be applicable to libel actions, is wholly inapplicable to an attempt to adjudicate a claim of one co-claimant against another in a limitation proceeding. For example, the time limitations in the rule refer to "the libel", and the impleaded party is required to answer "the libel". The "claimant" referred to in Rule 56 does not refer to a claimant in a limitation of liability proceeding. Under Rule 59 it is clear that the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was one who was in the posture of a defendant—the "claimant of the vessel proceeded against", if the proceeding was *in rem*, or the respondent, if the action was *in personam*. When Rule 59 was revised in 1920 and became Rule 56, the word "claimant" retained the same meaning—the claimant *of* the vessel. It does not refer to one who claims *against* the vessel, and who is in the posture of a plaintiff.

II

There is no substance to the asserted considerations of convenience and judicial policy upon which the court below relied. The claimants who seek to implead Transport Commission have not been denied something which they had been led to expect they would have; they were plainly told that the proceeding involved only the presentation of claims against the HAITI VICTORY and the contesting of the petition of the United States for exoneration from or limitation of liability for those claims. Nor is there substance to the suggestion that requiring suit against Transport Commission in England would cause expense and delay. For English and continental claimants, who are in the great majority, the expense of proceeding in England should indeed be less, and for the American claimants the added expense is balanced

by the added expense to Transport Commission of proceeding in the United States. No more time need elapse before the evidence is produced in England than in America. Moreover, although the issue of fault has now been settled, there is grave doubt that money judgments by co-claimants against the Transport Commission on individual damage claims would be deemed *res judicata* in England when sought to be enforced there.

Nor is there substance in the asserted analogy to *Alexander* v. *Hillman*, 296 U.S. 222. The filing of a claim in a receivership is taken as submission to the jurisdiction of the court for full adjudication of all claims between the estate and the claimant because distribution cannot be made until there has been a determination of the receivership estate, including amounts which may be due from claimants. That policy has no application to controversies among claimants in a limitation of liability proceeding; no matter how they may be decided, the limitation fund is not affected. For the same reason, a bankruptcy court cannot adjudicate controversies among creditors even when they grow out of transactions involved in the bankruptcy proceedings. *Fulton National Bank* v. *Hozier*, 267 U.S. 276; In re *Chakos*, 24 F. 2d 482 (7th Cir. 1928).

III

The authorities are uniformly contrary to the decision below. Benedict on Admiralty, the leading text, states flatly that impleader under Rule 56 is "not permitted in a limitation proceeding." Vol. 2, Sec. 349, 1955 Supp. p. 31. The Court of Appeals for the Fifth Circuit has so held in a case closely analogous to the present one. *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949). Several decisions have reached the same result in cases where a limitation petitioner, rather than a co-claimant in a limitation proceeding,

has sought to invoke Rule 56 (*New Jersey Barging Corp.* v. *T.A.D. Jones & Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co*, 81 F. Supp. 758 (S.D. N.Y. 1948); *Poling Bros. No. 5 — Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.); *cf. The Steel Inventor*, 1925 A.M.C. 226 (E.D.N.Y.)) although a recent decision, relying in part on the opinion of the court below in the present case, reached a contrary conclusion in that situation. *Moore-McCormack Lines, Inc.* v. *McMahon*, 235 F. 2d 142 (2d Cir. 1956).

There are, moreover, substantial dangers involved in permitting, in limitation of liability proceedings, the impleader of claimants not otherwise within the jurisdiction of the limitation court. Limitation proceedings can accomplish their purpose of marshalling claims and discharging American shipowners of liability only if foreign claimants, who cannot be ordered to appear by monition, are willing nonetheless to do so. At the present time, as the instant case shows, they do appear and file claims. However, if the filing of a claim by a foreign claimant subjects him to suit by other claimants under a law foreign to him, he may ignore the limitation proceeding and bring an independent suit in his own country. Were many foreign claimants to elect that course, the effectiveness of limitation of liability procedures would be substantially destroyed. It is significant, in this connection, that in none of the numerous foreign countries which permit limitation of liability is a claimant exposed to the risk which the decision below imposes upon claimants in limitation of liability proceedings in the United States.

ARGUMENT

The issue presented here for review is whether Admiralty Rule 56, by its terms and in the light of history

and authority, either describes a limitation of liability proceeding as among those to which the rule is applicable, or describes those who here seek to invoke the rule as among those entitled to do so. Is a limitation of liability proceeding a "suit, whether *in rem* or *in personam*" into which a new party in the posture of a defendant may be introduced? Are the respondents who sought to implead Transport Commission in the position required by Rule 56 of those who may invoke it; that is, in the position of defending against asserted liability? The answer to both questions is, no. Neither the specific language used, nor the antecedents of the rules, nor considerations of equity or policy, require or permit Transport Commission under these circumstances, in an alien jurisdiction and under alien law not of its choosing, to be subjected to liability. Nor does the rule permit or require foreign claimants to come to this jurisdiction to litigate with Transport Commission.

I

History and analysis demonstrate that the impleader of Transport Commission was erroneous

A brief reference to the history and purpose, not only of Rule 56, but of Rules 51-54, which regulate limitation proceedings, is helpful. In our admiralty courts limitation of liability is over thirty years older than the third party practice which is the subject of Rule 56. The occasion for and the purpose of the latter rule had and has nothing to do with the principles of limitation.

In this country, and in others where the right is granted, limitation is a legislative graft upon the principles of admiralty. As the size of ships grew with the passing of the days of sail, liabilities which might be incurred by a shipowner in a major disaster could be so

great as to discourage venturing on the sea. Maritime nations acted to permit limitation of liability, in general by separating the owner's *fortune de mer* (his interest in the ship) and his *fortune de terre* (his general estate). See Marsden, *Collision at Sea* (10th ed.), pp. 175-178. The United States did likewise.[1]

The legislation in this country (the Act of March 3, 1851, c. 43, 9 Stat. 635, as amended, Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) was, in its sponsorship, both eminent and, to use a word unknown at the time, bipartisan. The bill in the Senate (S. 251, 31st Cong., 2d Sess.) was introduced by Hannibal Hamlin of Maine. The Senator asking for the yeas and nays was Jefferson Davis of Mississippi (Congressional Globe, Dec. 2, 1850-March 3, 1851, p. 738). The law permitted a shipowner to limit his liability for, among other things, loss, damage, or injury from collision, occurring "without the privity or knowledge of such owner", to "the value of the interest of such owner in such vessel and her freight then pending". This Court has declared that the purpose of the statute was "to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers*, 312 U.S. 383, 385.

The form of proceeding by which limitation of liability might be secured was not prescribed by the statute, other than that it should be "appropriate" (Rev. Stat. § 4284, 46 U.S.C. § 184). "We have said," wrote Mr. Justice Bradley, this Court's great authority on

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[1] For a more detailed history of limitation of liability laws in this country and abroad, see *Norwich Co.* v. *Wright*, 13 Wall. 104, 116-122; *Providence & N.Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 587-590; *The Main* v. *Williams*, 152 U.S. 122, 126-128.

limitation of liability, in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 590, "that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect.

"Although the act was passed in 1851, it stood on the statute book for twenty years before a careful scrutiny of its provisions was demanded of this court. In the case of *The Norwich Transportation Company* v. *Wright*, decided in December term, 1871, and reported in 13 Wallace, 104, we were called upon to interpret the act, and to adopt some general rules for the better carrying of it into effect. On that occasion, a history of similar acts, both in England and this country, an examination of the general maritime law on the same subject, and the circumstances under which the act of 1851 was passed, were reviewed, and the general effect and construction of the act were examined and discussed. The consideration given to the whole subject in the opinion delivered in that case, and in subsequent opinions of this court when the matter has been brought up for examination, notably in the cases of *The Benefactor*, 103 U.S. 239, and *The North Star*, 106 U.S. 17, supersedes the necessity of any minute examination of the law at this time. We will make one extract from the opinion in the case first referred to. It is there said:

" 'The proper course of proceeding * * * For aiding parties in this behalf, and facilitating pro-

ceedings in the district courts, we have prepared some rules which will be announced at an early day.'

"These rules were announced at a subsequent day of the same term, and will be found at the commencement of 13 Wallace, pages xii. xiii."

The benefit of the limitation of liability provided by the Statute of 1851 may be claimed by way of defense,[2] or by initiation of the proceeding established by the rules of 1872, as amended. Proceeding under the rules the shipowner files his petition in the appropriate district court and either surrenders the vessel or posts a bond for the value after the accident of his interest in the vessel and her freight. The court then issues its "monition against all persons asserting claims in respect to which the petition seeks limitation", which is published in such newspapers as the court may direct. Here it was published in, among others, London newspapers. (R. 29). The monition directs all persons having claims that they "must file them under oath, . . . with the clerk of this Court" before a date certain "or be defaulted. Personal attendance is not required." And the court "shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding." (Rule 51, *infra*, p. 47).

In the subsequent proceedings determinations are made as to whether liability exists, whether it may be limited and what amount, if any, should be awarded

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[2] *The "Benefactor"*, 103 U.S. 239; *Providence & N.Y. S.S. Co. v. Hill Mfg Co.*, 109 U.S. 578, 594.

to those filing claims. If liability is found, the *res* in the custody of the court, if there be any (the vessel or its value as appraised after the accident, and the pending freight for the voyage), is then distributed pro rata to all established claims according to their priorities, innocent parties taking precedence and death and personal injury claimants having the benefit of Rev. Stat. § 4283(b), as amended, 49 Stat. 1479-80, 46 U.S.C. § 183(b).[3]

Plainly, a proceeding in the admiralty to limit liability has been aptly described by an eminent authority as a "special proceeding, *sui generis*." *Benedict on Admiralty* (6th ed. 1940) §479, *et. seq.* In order to bring all the claims into concourse and settle the shipowner's liability as expeditiously as possible, he is given the choice of forum and those who have suffered loss and injury are "brought in against their will and prevented from establishing their claims in other courts", *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 217—that is, prevented, so far as the United States has power to prevent them. In this unique proceeding the moving party, the shipowner, has two attributes of a plaintiff. He takes the initiative in instituting the proceedings, and he chooses the forum. But his chief attributes are those of a defendant, in that he seeks exoneration from fault or, in any event, to minimize the claims against him. On the other hand, those brought in against their will to prove their loss and damage have only the attributes of plaintiffs, albeit involuntary ones.

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[3] Should limitation be denied, the court may add to the fund in its custody by an *in personam* judgment against the owner to satisfy the full allowed value of the claims. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207.

During the century and more that this limitation of liability procedure has existed, it has been judicially administered so as to marshal, determine, and dispose finally of all claims *against the shipowner-petitioner*. In furtherance of *that* purpose, (the purpose, as Mr. Justice Bradley puts it, "of giving to shipowners the full benefit of the immunities intended to be secured by it," *Providence & N.Y.S.S. Co.* v. *Hill Mfg. Co., supra*, 109 U.S. at p. 589) the Court has given the Act a broad and equitable construction. *Norwich Co.* v. *Wright*, 13 Wall. 104, 121-22; *Providence & N.Y.S.S. Co.* v. *Hill Mfg. Co., supra; Butler* v. *Boston and Savannah S.S. Co.*, 130 U.S. 527, 549-50; *Just* v. *Chambers*, 312 U.S. 383, 385; *Coryell* v. *Phipps*, 317 U.S. 406, 411. What respondents have sought here is quite different. The court below, by fusing with this proceeding, so special in nature, the totally inapplicable third party procedure provided by Rule 56 for wholly different reasons, drastically changes the proceeding from one to limit liability of a shipowner-petitioner to one where claims against other claimants may also be adjudicated.

Rule 56, as suggested, is later in origin and rooted in different considerations. In the October term of 1876 this Court decided *The "Atlas"*, 93 U.S. 302. It held, contrary to what, based upon British precedent (*The "Milan"* Lush. Adm. 388, 401), was said to have been the rule in the admiralty, that a libelant might recover his damages in full from one of two parties at fault, leaving the party sued to pursue contribution from the other wrongdoer. As a result of this decision, Judge Addison Brown, a distinguished admiralty judge, held in *The Hudson*, 15 Fed. 162 (S.D.N.Y. 1883), that where a libelant had proceeded against (libeled) one of two tugs at fault in a collision, the claimant (*i.e.*, the owner of the libeled tug) might, upon petition and

proper service, have the other tug "brought in as a party to the action [libel] in order that the damages might be apportioned between the two tugs, as would have been done had the [other tug] been joined as a party and adjudicated in fault." *The Hudson* was decided February 7, 1883. Rule 56 (then Rule 59) was promulgated, institutionalizing the decision, on March 26, 1883, 112 U.S. 743. For a discussion by this Court of the nexus between decision and rule see In re *New York and Porto Rico S. S. Co.*, 155 U.S. 523, 527; see also *Benedict on Admiralty* (3d ed. 1898) § 482b, pp. 271-72.

Rule 59 (now Rule 56) as adopted in 1883 read as follows:

> "In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued . . ."[4]

The Hudson was a collision case, and the resulting Rule 59 of 1883 was a collision case rule. Shortly thereafter, however, Judge Brown permitted the bringing in

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[4] 112 U.S. 743. The remainder of Rule 59 in its original form is substantially similar to the last two sentences of present Rule 56. See P. 50, *infra*.

of a third party by the claimant of the libeled ship in a cargo damage case. "The case of *The Hudson, supra,*" he said, "and the fifty-ninth rule in admiralty, though not literally applicable, furnish also an analogy for this order." *The Alert*, 40 Fed. 836, 839 (S.D.N.Y. 1889). This Court referred to *The Alert* with approval in *The Barnstable*, 181 U.S. 464, 467, and since then the respondent in an action *in personam*, or claimant of the vessel proceeded against in an action *in rem* (as the case may be) have brought in third parties in libel proceedings to enforce a lien for supplies, a lien for towing services, for salvage, or for stolen, misdelivered, or damaged cargo. 2 *Benedict on Admiralty* (6th ed. 1940) § 349, n. 24. This practice was in turn institutionalized in the revision of the General Admiralty Rules in 1920 in which Rule 59, as revised, became Rule 56. 254 U.S., app. p. 29.

It will be noted that in the original Rule 59 the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was "the claimant of any vessel proceeded against" (where the libel was *in rem*), or "any respondent proceeded against *in personam.*" The "claimant" was not a person presenting a claim—one in the posture of libelant or plaintiff—but the claimant of the ship libeled—one in the posture of a defendant. When the rule was made applicable to other than collision cases, the word "claimant", as the context shows, retained that same meaning. The new language—that "in any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person"—shows that "claimant" still referred to the claimant of a vessel in an *in rem* action. It does not refer to a "claimant" in a limitation proceeding, who is a claimant *against* a vessel—a plaintiff—rather than a "claimant of any vessel proceeded against"—a defendant.

The extension of the third party practice to libel actions other than those arising out of collision did not, in other words, change the basic fact that the procedure was available only to a party in the posture of a defendant —*i.e.*, a respondent or a claimant of a vessel proceeded against. A libelant, to be sure, has always been able to bring in other parties by amending his libel and serving them. He cannot, however, do so by petition under Rule 56. *The Johan Poulsen*, 1925 A.M.C. 178 (D. Ore. 1924).

The illumination of history and analysis begins to make clearer the considerations involved here. The statute of 1851 laid down a rule of substantive law—that the liability of a shipowner whose vessel collides with another "without the privity or knowledge of such owner" "shall in no case exceed the amount or value of the interest of such owner * * *, in such ship or vessel, and her freight then pending." The statute is imperative. No greater liability may, under the law, be enforced whatever the procedure. "It would," said Mr. Justice Bradley, "be a questionable exercise by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all. Such was not the intention of the rules adopted in 1872. Admiralty Rules, 54-57." *The "Benefactor"*, 103 U.S. 239, 244.

The purpose of the rules was to regulate the "initiatory steps," provided by § 185, Title 46 U.S.C., which at his option the owner might take in order to bring the claims against him into concourse and have a determination of where he stood. If Transport Commission and other claimants had chosen to bring libel proceedings against HAITI VICTORY and the United

States, there is no question that liability would have been determined by § 183(a). *The "Benefactor", supra.* It would have been true, also, that the libelant, having chosen the forum and availed of its process to hale the vessel and its owner before it, must respond to any counterclaim growing out of the collision which the owner may assert by cross libel. Indeed Admiralty Rule 50 requires that "the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs." Similarly a third person intervening in the proceedings for his own interest "shall be required . . . to give a stipulation with sufficient sureties . . ..to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree. . . ." Admiralty Rule 34.

But the statutory proceeding established by § 185 is very different from a libel. Ina forum of his choosing

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If his ship has neither been libeled nor is present in any district, and he himself has not been sued on account of any claim in respect to which he seeks to limit his liability, the vessel owner is permitted by Admiralty Rule 54 to file his limitation petition in *any* district court. Hence as a practical matter, the owner can, by prompt filing of the petition and removal of his ship, if it is in United States waters, choose his own forum. No other litigant in either admiralty, or in legal proceedings generally, has such freedom. Plaintiffs in admiralty proceedings other than those for limitation are restricted, like other plaintiffs, to forums where they can either attach the property of the owner or gain personal jurisdiction over him by reason of his residence or service of process upon him. A bankrupt or his creditors cannot freely choose a forum since only a court located in the district where the debtor has his place of business,

"the vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability" and shall surrender the ship or its value. "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." And wholly unlike the requirement of Rule 34 that interveners shall give security for possible damages decreed against them, Rule 51 requires no bond or security of any sort from persons claiming—not even attendance—and provides for no counterclaims against them.[6] The sole purpose of the proceeding and the sole

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residence, domicile, or property has the power to adjudge him bankrupt. 11 U.S.C. § 11. Even statutes which liberalize the traditional limits of process and venue do not by any means afford freedom of forum selection. The Federal Interpleader Act, for example, permits extraterritorial service of process, 28 U.S.C. § 2361, but venue, although not so restricted as under the general venue statute (28 U.S.C. § 1391), is still limited to a district where one or more claimants reside, 28 U.S.C. § 1397. See also Securities Act, 15 U.S.C. § 77v; Securities Exchange Act, 15 U.S.C. § 79y; Investment Company Act, 15 U.S.C. § 80a-43; Sherman Act, 15 U.S.C. § 5. The vessel owner in limitation proceedings can, on the other hand, pick a forum where potential claimants do not reside, or do business, or possess property, or are present either personally or through agents.

[6] The narrow nature and scope of the limitation of liability proceeding may also be seen from the established practice under local admiralty rules. Thus, although Section 5(b) of the 1939 Admiralty Rules for the Eastern District of Virginia, in effect when the instant claims were filed, provided that "no process *in rem* nor process of arrest or attachment shall issue, nor shall any appearance or answer be received . . . unless a stipulation in the penalty of $250 shall be first entered into by the party, and at least one surety, resident in the district, conditioned that the principal shall pay all

power of the court provided by the statute is to determine the disposition of the *res* in its possession. Neither the statute nor the Admiralty Rules contemplate nor provide for an enlargement of the proceeding to hear and determine claims asserted against the claimants, either by one or more of them or by the shipowner-initiator of the action. Indeed the issues to be considered are specified with particularity in the rules. Rule 52 establishes procedures for proving, determining, and satisfying the claims made against the fund. Rule 53 provides for the right of the owner to contest liability and of the claimants to contest exoneration from or limitation of liability. Thus are established the scope and the boundaries of this "special proceeding, *sui generis.*"

History and analysis lead us also to two conclusions respecting the procedures established by these rules. First, limitation of liability procedure is designed and constructed for a strictly limited purpose, to determine liability and, in accord with that determination, to dispose of the *res*—either returning it to the owner or distributing it among the claimants. So one entering this proceeding as a claimant subjects himself to the jurisdiction of the court only for the purpose of, and to the extent necessary to, disposition of the issues contemplated and permitted by the statute and the rules.

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costs awarded against him," the instant claimants entered the proceeding without regard to these requirements.

Section 6(a) of the 1952 rules of the important admiralty district courts for the Southern and Eastern Districts of New York, which served as a model for Section 6(a) of the new rules for the Eastern District of Virginia, effective July 17, 1954, provides that "no libel, petition, appearance, claim or answer shall be filed . . . unless the party offering the same shall file a stipulation for costs" in the amounts of $100 for suits *in personam* and $250 for suits *in rem*. Under settled practice, this section is likewise deemed inapplicable to claimants in a limitation of liability proceeding.

He does not subject himself, by responding to the monition to appear or be defaulted, to the determination of liability against himself. Therefore, mere service of writ upon his proctors, appearing for this limited purpose, does not subject him to the general jurisdiction of the court for the purpose of responding in damages. And it makes no difference whether the writ is thought of or called an original libel, a cross libel, or a petition to interplead. It is ineffective to give the court power to impose liability upon him. As the District Court said in this cause, "a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other." (R. 59)

Second, Rule 56 describes no process available to those who sought in this case to subject Transport Commission to liability. To begin with, the kind of admiralty suit in which new defendants may be impleaded is very specifically described in the rule. It is applicable to *libel* proceedings, whether *in rem* or *in personam*—a category into which limitation proceedings do not fall: The language of the rule makes this clear. (1) As to the time when the rule may be invoked, it may be done "before or at the time of answering *the libel.*" (2) The rule provides that after service of the petition to implead on the third party, "such suit shall proceed as if such vessel or person had been *originally proceeded against.*" Now it is only in a libel —and certainly not in a limitation proceeding—that a ship or its owner, alleged to have been at fault is "*originally proceeded against.*" (3) The rule goes on to provide that, after service of the petition to implead, the "new party shall answer the libel." In short, the whole wording of Rule 56 is directed towards its availability in libel proceedings and its inapplicability to limitation proceedings.

Furthermore, as we have already pointed out above (pp. 16-17), the party to a libel proceeding who is entitled under Rule 56 to bring in a third party as defendant is only the defendant himself, in admiralty called the respondent or claimant of the vessel libeled. This may not be done by a libelant or intervener, or claimant for damages under any description, all of whom are, of course, in the position of plaintiffs, not defendants.

In short, Transport Commission, a foreign corporation resident in England, did not by responding to the monition to enter this special and limited proceeding to limit the liability of the United States, subject itself by mere service upon its proctors to claims for damages. Not only is this so, but Rule 56, the instrument by which the result is sought to be accomplished is not applicable to a limitation proceeding and not available to any party in the position of the claimants in this case.

II

The Asserted Considerations of Convenience and Judicial Policy Relied on by the Court Below Are Without Substance

The District Court in this cause expressed succinctly the principles applicable here:

> "To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he

would be subject only in the jurisdiction of his residence or other place of voluntary entrance. Department of Highway v. Jahncke Service (1949) 5 Cir. 174 F. 2d 894 sustains this position. Although the impleaded party was not already in the cause, the same principle there enforced governs here.

"Denial of the instant motion will be based upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other." (R. 59).

The Court of Appeals agreed that a "hardship might . . . be suffered by the Commission" through the adjudication of claims against it, but thought that there "would be an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings." (R. 85). Claimants from many parts of the world, it said, had filed their claims in the limitation proceeding instituted by the United States. The question of fault had been adjudicated and was *res adjudicata*. The court should, therefore, go on to settle claims against the Transport Commission, else the claimants would have to pursue their causes of action against the Commission in another forum. The proper equitable principles it found in receivership cases such as *Alexander* v. *Hillman*, 296 U.S. 222—where a creditor who has come into the proceeding to assert a claim against the estate must respond to one asserted by the estate. It concluded:

"Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a single legal proceeding; (2) parties who submit themselves to the juris-

diction of a court in a legal proceeding should be bound by that court's decision on all questions appropriate to and seasonably raised in that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th Admiralty Rule. Certainly that spirit finds support in the Federal Rules of Civil Procedure." (R. 87-88).

Since the Court of Appeals largely assumed its premises—for instance, that it would be a hardship for claimants in, say, England and on the continent to proceed against a British corporation at its place of business in England, and that the question of its liability is one "appropriate to" the limitation proceeding instituted by the United States, and that a limitation proceeding is analogous to a receivership proceeding—we had best examine these premises with some care.

We might start from the principle, seemingly not very controversial, that to deny claimants something to which they were not entitled, and to receive which no expectation had been raised, was not to expose them to a hardship. What was it to which they were entitled in the proceeding which the District Court admonished them to enter? The published notice required by Rule 51 is very specific indeed. It provided:

"Notice is given that United States of America has filed a petition pursuant to Title 46, U. S. Code, sections 183-189 and 789, claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the USNS HAITI VICTORY from New York City to Bremerhaven, Germany, terminating on May 8, 1953, at Bremerhaven. All persons having such claims must file them, under oath, as provided in United States

> Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the United States Court House at Granby Street, Post Office Building, Norfolk, Virginia and serve on or mail to the petitioner's proctors * * * at * * * a copy on or before October 15, 1953, or be defaulted. Personal attendance is not required. Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy." (R. 29-30).

Thus the claimants were plainly told that all that was involved in the proceeding was the presentation of claims against the HAITI VICTORY and the contesting of the claims of the United States to exoneration from or limitation of liability for these claims. How then can it be said that there would be "an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings"? Since when has it been a hardship to require plaintiffs to sue in the jurisdiction of the defendant's residence or where personal service may be had upon him?

Nor is there any greater substance in the concern expressed by the Court of Appeals that to require claimants to sue Transport Commission in England would cause them "great expense" and expose them to the risk that "perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time." Plainly, the expense to English and continental claimants of a proceeding in England is no greater, and probably a good deal less, than one in Norfolk, Virginia. As for the American claimants, the added expense of litigating in England is no greater than the added expense to Transport Commission of

litigating in America.[3] And as for the loss of evidence through lapse of time, it is difficult to understand what the court had in mind. No more time need elapse before the evidence is produced in England than in America, and, for the European claimants, convenience of producing it in England is infinitely greater.

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[3] This is one hardship, however, which might be imposed on Transport Commission by being required to respond to claims in the Norfolk proceeding which would be very serious indeed. Could Transport Commission claim limitation of liability in that proceeding? It is plain that more than six months have expired since Transport Commission was put on notice of claims against it. Hence a petition for limitation of liability under 46 U.S.C. 185 is barred by the terms of the 1926 amendment to the statute. But does the bar extend to interposing limitation of liability as a defense? In the Second Circuit the district courts have generally held the defense to be unavailable unless claimed within the six months. *Cantwell* v. *Meade*, 120 F. Supp. 406 (E.D. N.Y. 1954); *The Joseph O'Donnell*, 37 F. Supp. 120 (E.D. N.Y. 1940); *The Irving*, 33 F. Supp. 59 (S.D. N.Y. 1940). *Contra: Moran Towing & Transp. Co.* v. *United States*, 80 F. Supp. 623 (S.D. N.Y. 1948); *Cantey* v. *McLain Line, Inc.*, 40 F. Supp. 887 (S.D. N.Y. 1941). The Court of Appeals has noted the point but found it unnecessary to decide it. *United States Gypsum Co.* v. *Conners Marine Co.*, 119 F.2d 689 (1941). The Third Circuit has held that six months applies only to the procedure by petition and not to the assertion of limitation as a defense. *The Chickie*, 141 F.2d 80, 84 (3d Cir. 1944); *De Cruz* v. *Hiering*, 69 F. Supp. 397 (D. N.J. 1947). And similar decisions have been made in Massachusetts and Florida. *Carpenter* v. *Mary R. Mullins, Inc.*, 33 F. Supp. 10 (D. Mass. 1940); *Coryell* v. *Pilkington*, 39 F. Supp. 142 (S.D. Fla. 1941), *aff'd on other grounds sub nom. Coryell* v. *Phipps*, 128 F.2d 702 (5th Cir. 1942), 317 U.S. 406. The only district court opinion in the Fourth Circuit bearing on the point views the six-month bar as applicable to the assertion of limitation by way of defense. *The Bright*, 38 F. Supp. 574, 577 (D. Md. 1941), *aff'd on other grounds*, 124 F.2d 45. How would the Court of Appeals for the Fourth Circuit decide this question? And how would its decision—whichever way it went—affect Transport Commission's right to limit its liability under the provisions of English law?

As the Court itself points out, the question of fault has been decided, is *res adjudicata*, and need not—indeed, cannot—be litigated again in England between the parties to the present proceeding. See *The "Benefactor", supra; Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transportation Corp.*, 86 F. 2d 708 (2d Cir. 1936); *The Adah*, 258 Fed. 377 (2d Cir. 1919). The English law is the same where, as here, the parties submitted to the court the issue of fault, accepting the jurisdiction *for the purpose of deciding that question.*[5]

But it is far from clear that, should an American court undertake to determine, in this proceeding, the liability of Transport Commission and give judgment upon claims against it, those judgments would be received as conclusive and the issues they purported to settle would be regarded as *res adjudicata* when they were sought to be enforced in an English court. For at the time when Transport Commission filed its claim here, it certainly could not be said that American law put Transport Commission on notice that a consequence of filing that claim would be to subject the issue

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[5] *Guiard v. De Clermont & Donner*, [1914] 3 K.B. 145; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301 (Ex. 1861); *see Emanuel v. Symon*, [1908] 1 K.B. 302, 309 (C.A.); *Schibsby v. Westenholz*, L.R. 6 Q.B. 155, 162 (1870); *Rousillon v. Rousillon*, 14 Ch. D. 351, 371 (1880); see Chesire, *Private International Law* 602-606 (4th ed. 1952).

The limitations of this doctrine, however, may be seen from *In re Dulles' Settlement (No. 2)*, [1951] Ch. 842. A ward of the court sought that his mother be given custody over him and that proper provision be made for his maintenance. Remaining beyond the territorial limits of the court, the father, by his counsel, contested the wife's claim for custody relying on a favorable French decree, but, as to the claim for maintenance, simply protested that the court had no jurisdiction over him. Carefully considering cases involving the enforcement of foreign judgments, the court held that contesting the issue of custody did not amount to a submission to jurisdiction on the maintenance claim.

of its own liability and claims against itself to the judgment of the same court. The Admiralty Rules of the Supreme Court of the United States would have seemed to provide the exact opposite, and such were the then decisions of American courts [9] and the pronouncement of its most distinguished writer on Admiralty law.[10]

Aside from the jurisdictional problems,[11] therefore, an English court regarding all the circumstances might well conclude that since Transport Commission was, in effect, lured into the predicament of facing numerous suits without the benefit of advantageous limitation rules and special defenses to which it is entitled under English law,[12] the judgment should not be enforced either on the ground that it stems from proceedings which "offend against English ideas of substantial justice" [13] or on the ground that "its recognition is contrary to public policy." [14]

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[9] *Department of Highways* v. *Jaüncke Service*, 174 F. 2d 891 (5th Cir., 1949); *New Jersey Barging Corp.* v. *T.A.D. Jones & Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5—Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.)

[10] 2 *Benedict on Admiralty* (6th ed. 1940) § 349, 1955 Supp., p. 31.

[11] See note 8, *supra*

[12] Under English law the amount at which liability may be limited is far lower than in the United States, generally £15 per ton of tonnage. Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503. Furthermore, the English rules of liability are substantially different from those applied in our courts. A carrier under English law may by appropriate contract and notice limit its liability for negligence, and periods of limitation for the assertion of damage or loss are different. See Collision Claims—Difference Between British and U.S. Law, Lloyds List and Shipping Gazette, July 14, 1953.

[13] *Salveson or von Lorang* v. *Administration of Austrian Property*, [1927] A.C. 641, 663; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, 790.

[14] In re *Maccartney*, [1921] 1 Ch. 522, 527

Finally, the Court of Appeals has been led astray by the belief that principles applied to counterclaims against claimants in equity receiverships furnish a guide here. The very case cited by the Court—*Alexander* v. *Hillman*, 296 U.S. 222—makes plain the reason, not present in the instant case, why the filing of a claim in a receivership is taken as submission to the jurisdiction of the court for full adjudication between the estate and the claimant. "Respondents' contention means," said this Court, "that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. . . . Distribution may not be made without decision on the counterclaims. *Nothing is more clearly a part of the subject matter of the main suit than recovery of all that to the res belongs.*" (Emphasis supplied.) 296 U.S. at 241-242.

But here, in this limitation proceeding the *res* is the value of the United States Government's interest in the HAITI VICTORY. Transport Commission's alleged liability to the other claimants does not, in the language of this Court, to that *res* belong. Nor is it true that "distribution" (*i.e.*, exoneration of the United States) may not be made" without decision on the claims made against Transport Commission by other claimants. Hence it seems abundantly clear that the essential basis for the holding in equity receivership cases that the filing of a claim confers personal jurisdiction over the claimant to enforce a counterclaim is wholly absent here.

Even more revealing is the situation in bankruptcy proceedings. For in these, unlike equity proceedings but like those for limitation of liability, the jurisdiction of the court over the subject matter is limited by the provisions of a statute. So, for instance, one who holds property adversely to the bankrupt and not merely under colorable claim does not, by filing a claim, submit the determination of his rights in the property adversely held to the summary jurisdiction of the bankruptcy court. *Cline* v. *Kaplan*, 323 U.S. 97; *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (5th Cir. 1951). Of even greater present relevance here are the many decisions, covering a whole variety of situations, in which bankruptcy courts have been held without jurisdiction to decide controversies between claimants or between claimants and third persons, even growing out of transactions involved in the bankruptcy proceedings, unless their determination was essential to dispose of the funds in the hands of the trustee. *Fulton National Bank* v. *Hozier*, 267 U.S. 276; *Central States Corp.* v. *Luther*, 215 F. 2d 38, 45 (10th Cir. 1954), *cert. denied*, 348 U.S. 951; *Brumby* v. *Jones*, 141 Fed. 318 (5th Cir. 1905); In re *Chakos*, 24 F. 2d 482 (7th Cir. 1928); *Nixon* v. *Michaels*, 38 F. 2d 420 (8th Cir. 1930); *Evarts* v. *Eloy Gin Corp.*, 204 F. 2d 712 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; In re *Pyrocolor Corp.*, 46 F. 2d 554 (S.D.N.Y. 1930); *Kaplan* v. *Guttman*, 217 F. 2d 481 (9th Cir. 1954); In re *Lubliner* v. *Trinz Theatres*, 100 F. 2d 646 (7th Cir. 1938).

The *Chakos* case, *supra*, illustrates how irrelevant it is that the controversy which may not be determined arises out of the same facts as one which must be determined in the bankruptcy proceeding. Steve Chakos was adjudged bankrupt and among his creditors was one Frawley, who claimed under a lease made by him to

Steve and his brother, Gus. Frawley not only asserted a claim as a general creditor of Steve but also invoked the jurisdiction of the court to enforce Gus's liability under the lease. The court upheld Frawley's status as a general creditor but characterized the controversy with Gus as "one concerning solely alleged civil liability of third persons" not "affecting the property of the bankrupt" and held that not even consent of the parties could confer jurisdiction on the court. It will be seen that here the lease was a transaction common to both controversies.

In short, the similarity which the Court of Appeals thought existed between limitation proceedings and equity receivership proceedings turns out on examination, we submit, to be a complete dissimilarity. In this limitation proceeding, the question of the liability of Transport Commission to these claimants does not pertain to the only issue which the court in statutory limitation of liability proceedings is empowered to adjudicate—the rights of shipowner and claimants to the *res* before it. Transport Commission's liability does not "to the res belong." On the contrary, the real analogy of bankruptcy proceedings, governed as they are by a specific and jurisdictionally restricted statute, makes it plain that the claimants' rights against one another may not be litigated and adjudicated in the limitation proceeding.

III

PRIOR DECISIONS IN THE UNITED STATES, AND THE LAWS OF FOREIGN NATIONS, REFLECT THE DANGERS TO LIMITATION PROCEDURES WHICH WOULD RESULT FROM THE DECISION BELOW.

We have already noted that until the present case the course of decisions in the lower federal courts denied the right of impleader which has been granted to the

present claimants. Contrary to the belief of the court below that the matter was "a question of first impression" (R. 84), the precise point involved—that Rule 56 is inapplicable to limitation proceedings—had already been passed upon several times adversely to the conclusion reached below in this case. Indeed, the leading text on admiralty states that impleader under Rule 56 is "not permitted in a limitation proceeding". 2 Benedict on Admiralty (6th ed. 1940) Sec. 349, 1955 Supp., p. 31.

The earlier authority principally relied upon by the District Court (R. 59) was *Department of Highways* v. *Jahncke Service*, 174 F. 2d 891 (5th Cir. 1949). In that case a damage claimant in a limitation of liability proceeding sought to implead, under Rule 56, a third person alleged to be jointly liable with the limitation petitioner. A motion to strike the third party petition was granted by the District Court, and was affirmed on appeal. Although the third party sought to be impleaded was not a claimant, as Transport Commission is here, the opinion of Judge Hutchison indicates that he did not regard that fact as in any way material. The third party was within the jurisdiction of the court and was subject to service of process. If Rule 56 permits one claimant in a limitation proceeding to implead another, as held below, it must perforce permit a claimant in such a proceeding to implead any third party upon whom service can be had. The *Jahncke* decision, rather, rests upon the analysis outlined in Point I, *supra*. The court said (174 F. 2d at p. 895):

> "Further, a consideration of the origin, nature and purpose of a limitation of liability proceeding and of the origin, nature and extension of the third party practice under original Admiralty Rule 59,

> now Rule 56, leaves us in no doubt as to the correctness of appellee's contention." (Footnotes omitted.)

The same result had also been reached in several cases in which a limitation petitioner, rather than another claimant, has sought to invoke Rule 56 to implead a claimant or a third party. *New Jersey Barging Corp.* v. *T.A.D. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5—Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.). In each of these cases the court regarded the attempted impleader as improperly expanding the necessarily special and limited purpose of the limitation of liability proceeding. In the *New Jersey Barging Corp.* case, for example, Judge Lumbard (sitting in District Court), concluded that the limitation petitioner was seeking to convert the proceeding into one by the other claimants against the claimant which the limitation petitioner sought to implead—a proceeding in which the limitation petitioner would become "little more than an interested onlooker." Judge Lumbard stated (135 F. Supp. at p. 99):

> "It would be odd, indeed, if a shipowner could, by the device of a limitation of liability proceeding, initiate on the behalf of claimants it does not represent an action against a corporation in a jurisdiction where it could not otherwise be sued."

Nor could the court find any basis in Rule 56 for permitting the limitation petitioner to seek an affirmative recovery against the claimant. In *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transportation Corp.*, (86 F. 2d 708, 710) (2nd Cir. 1936), Judge

Learned Hand had stated of a limitation of liability proceeding: "At no time can the owner [limitation petitioner] recover a dollar by means of it from anybody." Relying upon that statement, the court in the *New Jersey Barging Corp.* case also concluded that a limitation proceeding "is a defensive action" (135 F. Supp. at p. 99). Moreover, as Judge Lumbard pointed out, the limitation petitioner, though in fact in a defensive position, has a considerable degree of initiative as to the forum in which he will proceed, and can thus deprive claimants of their ordinary right to choose their forum. He adds (135 F. Supp. at pp. 99-100):

> "To hold that after having summoned the claimants to a forum of his choosing he may then assert against them his own affirmative claims would go far beyond what the statute would permit."

One situation can probably be fairly distinguished. Where a limitation claimant itself invokes the jurisdiction of the court to limit his own liability, it is obviously no imposition upon him to require that he answer claims over against him. In this situaton, two District Courts have permitted Rule 56 to be utilized to achieve a desirable consolidation of the proceedings. *City of Boston*, 182 Fed. 171 (D. Mass. 1909); *The Clio-The Springhill*, 1948 A.M.C. 75 (S.D.N.Y. 1947). In each instance the owners of the vessels involved in a collision had filed separate but contemporaneous limitation proceedings in the same court. In each case the court permitted limitation petitioner A, in whose limitation proceeding B, the owner of the other vessel, had filed a claim, to implead B under Rule 56.

These two decisions represent the only instances in which impleader under Rule 56 has ever been sanctioned in a limitation proceeding, so far as we have been able

to determine. Whether they were correctly decided, or whether some other procedure should have been utilized to bring together the two related limitation proceedings which were pending before the same court, need not now concern us. No comparable situation is presented in a case such as the present one, where not only is the claimant sought to be impleaded present merely because of its response to a monition, but also is sought to be impleaded by other claimants, rather than by the limitation petitioner itself.

In the present case the Government, as the limitation petitioner, made no attempt to invoke Rule 56. Instead, following the decision below, and the remand of the cause to the District Court, it filed a so-called "cross-libel" under Rule 50, and served it upon the proctors for Transport Commission (see pp. 4-5, *supra*). Such a procedure had been expressly disapproved by no less an authority on admiralty than Judge Hough in *The Steel Inventor*, 1925 A.M.C. 226 (S.D.N.Y.), in which he stated (pp. 228-229):

> "Thus the affair resolves into this—can an affirmative decree for damages against a claimant (plus exoneration fro mlaibility on the part of petitioner) issue under a cross libel in a limitation proceeding? I think not, not only because it has never been done (though that has its potency) but because the nature of the cause of action in limitation, the necessary framework of pleadings and the wording of Rule 50 prevents it."

Very recently, the Court of Appeals for the Second Circuit, reversing the District Court for the Southern District of New York, has permitted such a "cross-libel" to be filed, citing as "persuasive" the decision of the court below in the present case. *Moore-*

McCormack Lines, Inc. v. *McMahon*, 235 F. 2d 142 (1956). There are, of course, considerations which distinguish the right of a limitation petitioner to file a "cross-libel" under Rule 50 from the right of one claimant to implead another under Rule 56. Whatever equitable rights there may be between a limitation petitioner and a claimant (*cf. United States* v. *The Thekla*, 266 U.S. 328) do not exist between persons whose only relationship is that they both have filed claims in a limitation proceeding. Nevertheless, we believe the earlier decision by Judge Hough in *The Steel Inventor* to be sound. The opinion in the *Moore-McCormack Lines* case did not analyze the history or nature of either a limitation proceeding or the third party practice in the admiralty, and accepted, uncritically, the same alleged analogies from "modern civil practice" which we have already shown (pp. 29-31) to be inapplicable when applied to the special and unique problems presented by a proceeding to limit liability in admiralty.

Indeed, whatever may be the superficial attraction of the analogy to third party practice in ordinary litigation, a moment's reflection will reveal the unwisdom of an indiscriminate graft of such procedures onto limitation of liability actions in admiralty.

The dangers are very real, and very substantial. They arise directly from the fact that ships are nomadic, whereas the courts of any single country are limited in the extraterritorial effectiveness of their monitions and decrees. If limitation proceedings are to accomplish their purpose of marshalling claims and discharging the owner, foreign claimants—claimants against whom the monition of the limitation court is precatory rather than mandatory—must be encouraged to respond. In the present case, for example, in re-

sponse to the monition of the Norfolk court, which was published not only in the United States but in newspapers in other countries (R. 29), 115 claims were filed, of which only 11 were by Americans. Among the foreign claims, 71 were by British subjects, 18 by Germans, 8 by Dutchmen, and one each from Australia, Ireland, Italy and Norway. Foreign claimants do appear in United States limitation proceedings, in other words, even though there can be no compulsion exerted on them to do so.

Were foreign claimants to conclude, for any reason, that they should not file their claims in the United States limitation proceeding, the consequences would be serious. A decision by the United States court on the issue of fault would not be res judicata against foreign claimants who do not file claims, and of course the final injunction of the limitation court against suits would not be effective to prevent suits by such foreign claimants in their own countries. Any claimant domiciled in, or even near, a country in which there was any reasonable prospect of levying attachment on the ship, or on any other ship or property owned by the same person or corporation,[15] or of securing personal service on the owner itself, could sit tight and bring an independent suit.[16]

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[15] "The process of foreign attachment is known of old in admiralty. It has two purposes: To secure a respondent's appearance and to assure satisfaction in case the suit is successful." *Swift & Co. v. Compania Caribe*, 339 U.S. 684, 693. See Admiralty Rule 2.

[16] In England, for example the court is authorized to extend the period of the statute of limitations indefinitely when "there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court." Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57) Sec. 8.

The consequences, of course, would be either a *pro tanto*, or a complete, failure of the limitation proceeding. Necessarily, the petitioning owners and their fleet would continue in jeopardy in respect to foreign claimants who elected to bring suit abroad. Furthermore, if enough claimants were to abstain so that the aggregate of presented claims was reduced to an amount less than the fund deposited by the petitioner, the limitation procedures would be completely unavailable.[17]

No one, of course, can document statistically the extent to which limitation procedures in the United States would become ineffective or illusory if the position of the court below were to be adopted here. Some claimants might regard the likelihood of claims against them as so negligible as to be irrelevant. To most, however, the possibility of being subjected to unknown liability in a foreign court applying foreign law would represent a hazard to be weighed seriously

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[17] Limitation proceedings are not primarily intended to prevent a multiplicity of suits, but rather to marshall claims and distribute an inadequate fund. *Petition of Texas Co.*, 213 F. 2d 479 (2d Cir. 1954); *Petition of Moran Transp. Co.*, 185 F. 2d 386, 388-389 (2d Cir. 1950). Prior to the 1935 amendments which limited the time within which limitation proceedings could be initiated, the proceeding would be dismissed when the claims did not exceed the fund. *The Aquitania*, 14 F. 2d 456 (S.D. N.Y. 1926); *The Tug No. 10*, 237 F. 105 (S.D. N.Y. 1916). Since 1935 jurisdiction is retained, but all exercise of it suspended and the petition for limitation is not finally dismissed until it has been determined (by independent litigation, etc.) that the claims are insufficient to exhaust the fund. *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F. 2d 273 (2d Cir. 1947).

In the present case, had no foreign claimants appeared, the total amount claimed by the persons within the jurisdiction of the District Court would have been less than half of the value of the Haiti Victory.

against the possibility of suing in their own country. One can surely say, at least, that the consequences in terms of effective limitation proceedings in the United States would be substantial.

Although the rationale has not been expressed in these terms, it is significant that in no foreign country is a claimant in a limitation proceeding exposed to the risk which has been imposed by the decision below upon claimants in limitation proceedings in the United States. In England, for example, the right to limitation is now embodied in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) and other statutes. The petition for limitation of liability is made to the Admiralty Registrar in accordance with Rule LV (H) of the Rules of the Supreme Court [see The Annual Practice 1956 (London, 1956), pp. 1211c, 1212], which makes no provision for either counterclaims or impleaders among co-claimants.

In Canada, limitation of liability is provided for in Sections 657-659 of the Revised Statutes (Canada Shipping Act, 1934, c. 44), and is administered by the Exchequer Court, and District Judges in Admiralty by assignment from that court. The "General Rules and Orders Regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada" (The Canada Gazette, July 29, 1939 (Suppl.)) contain no specific rules with respect to limitation proceedings. Rule 33, a rule similar to Rule 56 of this Court, permits "a defendant" to move for the joinder of a third person from whom he asserts "that he is entitled to contribution or indemnity". There is no suggestion that one claimant may invoke this third party procedure against another claimant, as is sought to be done here.

Likewise, in the continental countries, impleader or comparable procedural moves similar to that sanctioned

by the court below, are unheard of. Three basic systems of limitation of liability exist in those countries: (1) the French system of "abandon", which is also applied in Italy, Spain and some 16 other European, Middle Eastern and Latin American countries;[18] (2) that German "execution" system under which the vessel itself, and not the owner, is responsible for damage done by it, and the liability of the owner is limited from the outset to his interest in the vessel;[19] and (3) the "option" system of the Brussels Convention of 1924,[20] which in practice means the English system, since in most cases it is more advantageous for the owner to limit his liability on the basis of £8 per ton (or £16 per ton if death or personal injuries are involved) than

[18] Code de Comm., Art. 216; see Ripert, Droit maritime (1952) ed.), Secs. 1254bis, 1283-1284, 2008. As to Italy: Cod. di Navig. (1941) Arts. 275-277, 620-641; see d'Ovidio-Pescatore, Manuale di diritto della navigazione (1950) pp. 442 *et seq.* As to Spain: Código de comm., Art. 587; see de Montellá, Código de commercio español comentado, Vol. IV 1° (1936) pp. 120, *et seq.* In Belgium the system of "abandon" still prevails, although in some cases it is combined with the English system of limitation per ton: Code de Comm., L. II, Arts. 46 *et seq.*; see Répert. prat. du droit belge (1951), Vol. VIII, V° "Navire-Navigation", Nos. 318-321.

[19] German Comm. Code (HGB) Arts. 486, 761; see Wüstendörfer, Neuzeitliches Seehandelsrecht (1950 ed.), pp. 125, 129-130, 137-138; Gierke, Handelsrecht und Schiffahrtsrecht (1955 ed.), Sec. 81; Ripert, *supra*, Sec. 1283.

[20] Brussels Convention of August 25, 1924 (League of Nations Treaty Series, No. 2763). The convention has also been ratified by a number of other countries, and has produced some uniformity with respect to the *amount* of liability to which the owner is to be held subject in a limitation proceeding. It has not been ratified by the United States, the United Kingdom, or Germany. Currently efforts are being made to rewrite the Convention to increase the scale of liability so as to encourage its broader adoption. See Le droit maritime francais, Vol. VIII, p. 1 (Jan. 1956).

to abandon the vessel and freight.[21] Sweden, which has a relatively new (1948) procedural code, and which comes perhaps closest to our own system, may serve as an example. Limitation proceedings there are initiated by the owner and conducted before an "average adjuster" (Com. Code, Art. 261), whose duties are limited to the determination of the amount to which the owner's liability is to be limited, and the distribution of that amount among the claimants. The decision of the average adjuster may be appealed to the regular Swedish courts, but the results of the proceedings are res judicata on those issues, when finally determined. Similar procedure applies in Italy and Belgium, with the exception that the limitation proceedings take place before a judge-commissioner.

In all civil law countries the limitation proceedings are based on the admission by the owner of *in rem* liability, or follow separate proceedings in which that liability is determined. If fault is disputed (*i.e.*, if the shipowner claims that he is not liable even *in rem*, or if the claimants contend that he is liable also *in personam*) that issue is separately tried in court proceedings rather than litigated, as in the United States, as a part of the limitation proceeding itself. At no stage of any of the proceedings, however, is there any method or practice by which they could be expanded to adjudicate liability among the claimants themselves. The proceedings always take place between the claimants on the one side, and the owner or the limitation fund on the other.

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[21] Countries in this group are Holland (since 1927; see Wetboek van Koophandel, Arts. 474, 525, 541; Völlmar, Zee en Binnenvaartrecht (1952 ed.), Sec. 136, 137, 247, 248, 279); and the Scandinavian countries (since 1939; see, e.g., Swedish Maritime Code, Ch. 10. Until then the Scandinavian countries generally followed the German pattern).

Even where, as in France or in Holland, the case law (Trib. civ. Poitiers, 21 February 1901; Ripert, *supra*, Sec. 1322) or the basic rules of civil procedure applied to maritime law (Wetboek van Burgerlijke Regtsvordering, Art. 320a, and *passim*) allow a "compensation" or counter-claim by the limitation petitioner against a claimant, it is in the nature of a set-off only, not an affirmative judgment. A joinder of actions, possible in the discretion of the court in Holland in fact situations similar to those contemplated by Admiralty Rule 56, applies only to libel, and not to limitation proceedings.

Nowhere in the codes of other countries, nor in the commentators on them, have we found any suggestion that the result reached by the court below is even possible. Impleader in limitation of liability proceedings of a claimant otherwise not within the jurisdiction of the court is a procedure unknown in other maritime countries and unsanctioned in the United States until the decision of the court below. To permit it now in the United States will, to an incalculable but substantial extent, destroy the very object of the proceeding by frightening away claimants, who, as this litigation itself indicates, are normally willing to submit to the limited jurisdiction of the limitation court. This is more than just robbing Peter to pay Paul. It is mortgaging for the future the shipowner's recognized need for effective international limitation of his liability in order to cater to the convenience of a few claimants in one particular litigation. It is this, and not principles of "modern civil procedure", or seeming analogies to equity receiverships, which is the basic problem of policy presented by this proceeding. The answer, we submit, should preserve limitation procedures for what they are designed to do—limit, effectively, a ship-

owner's liability. The decision below, which seeks to make of them a forum for other controversies also, may well result in destroying their effectiveness for any purpose.

CONCLUSION

WHEREFORE, the judgment of the Court of Appeals reversing the decree of the District Court denying the impleading of the Commission by the other claimants in the limitation proceeding should be reversed, and the decree of the District Court should be affirmed.

Respectfully submitted,

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MARCH, 1957.

The United States Code, Title 46, provides:

§ 183 (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * *

§ 185. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out

the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Admiralty Rule 51 provides:

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner

may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage, or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and

any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

UNITED STATES DISTRICT COURT
DISTRICT OF

NOTICE OF PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed . . . . .)

Notice is given that . . . has filed a petition pursuant to Title 46, U.S. Code, §§ 183-189, claiming the right to exoneration from or limitation of lia-

bility for all claims arising on the voyage of the vessel . . . from . . . to . . . terminating on . . . .

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U.S. Court House at . . . and serve on or mail to the petitioner's proctors . . . at . . . a copy on or before . . . or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

. . . . . ,

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.

Admiralty Rule 53 provides:

In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied.

Admiralty Rule 56 provides:

In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the

particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA,
As Owner of the U. S. N. S. HAITI VICTORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order and opinion of the District Court (Pet. App. 1, 2) dismissing cross claims against petitioner are not reported. The opinion of the District Court (Pet. App. 3–10) exonerating the United States from liability is reported at 131 F. Supp. 712. The opinion of the Court of Appeals (Pet. App. 12–22) is reported at 230 F. 2d 139.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1956. By order of the Chief Justice, signed on April 10, 1956, the time for filing a petition for a writ of certiorari was extended to

July 12, 1956. The petition for a writ of certiorari was filed on July 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, both lower courts erred in finding that the United States, as owner of the U. S. N. S. *Haiti Victory*, was free from fault in a collision of the *Haiti Victory* with petitioner's vessel, *The Duke of York*.

2. Whether the Court of Appeals was correct in holding that claimants in an admiralty liability limitation proceeding could cross-claim against another claimant in the same proceeding for damages arising from the same occurrence.

STATUTES AND RULES INVOLVED

The navigational rules pertinent to this proceeding are set forth at pages 3–5 of the petition.

STATEMENT

Petitioner is a claimant in a proceeding brought in the District Court for the Eastern District of Virginia by the United States as owner of the Naval Transport *Haiti Victory* (hereafter called *Haiti*) for exoneration from or limitation of liability for loss or damage resulting from a collision between that vessel and the overnight ferry, *Duke of York* (hereafter called *Duke*), owned by petitioner, on May 6, 1953, in the North Sea (Pet. App. 3). During the pendency of the proceedings, other claimants against the *Haiti* filed cross-claims against the *Duke* to recover for death, personal injury, and loss of baggage (Pet. App. 1). The District Court, in a memorandum opinion,

held that the claimants could not cross-claim against another claimant, such as petitioner, and dismissed the cross-claims (Pet. App. 1, 2). Subsequently at the trial of the limitation proceeding, the District Court exonerated the United States from all liability, holding the *Duke* solely to blame for the collision (Pet. App. 3–10). Petitioner and the other claimants then appealed to the Fourth Circuit which sustained the District Court in finding the *Duke* solely at fault, but reversed the District Court's order refusing to hear cross-claims between claimants in a limitation proceeding (Pet. App. 12–22). All claimants seek review by this Court.[1]

The facts found by both the District Court and the Court of Appeals may be summarized as follows:

The *Duke* left the Hook of Holland bound west across the North Sea for Harwich, England, a few minutes after midnight, May 5, 1953 (Pet. App. 4). She continued to make full speed through intermittent heavy fog up to the time of the collision (Pet. App. 4, 6), although her radar equipment had failed a short time after she got under way. That the *Duke* was at fault was not seriously contested below (Pet. App. 13).

The *Haiti* had taken on a Trinity House pilot at Dover at 1:17 a. m. of the same morning and was steaming northwest up the channel in clear weather with no fog visible (Pet. App. 4, 8). When she passed

[1] The passenger claimants have filed a petition for a writ of certiorari from that part of the Court of Appeals judgment exonerating the *Haiti* from liability. *Arthur Goodman et al.* v. *United States*, No. 249.

abeam of Galloper Lightship at 4:14 a. m. (Pet App. 5, 8), the *Haiti's* mate turned on the ship's radar (which was located on the bridge and had been placed on standby two hours earlier) and took a bearing on the lightship, but did not look for, or see, any indication of the *Duke* (Pet. App. 9). Soon thereafter, the *Haiti's* forward lookout reported a whistle off the starboard bow. The pilot, after looking in the direction of the sound and seeing nothing, went to the radar and saw a target on his starboard bow, and immediately (at approximately 4:15 a. m.) stopped the *Haiti's* engines (Pet. App. 5).

The *Duke* was running at full speed on a westerly course through a thick fog bank completely invisible to the *Haiti's* crew, when her lookout saw the *Haiti's* lights one quarter mile away. Both vessels went full astern in the succeeding half minute, but were unable to avoid a collision in which the *Haiti's* stem penetrated the *Duke's* port bow, causing the loss of several lives and substantial property damage.

The District Court found that the *Duke* violated Article 16 of the International Rules (33 U. S. C. 145n; Pet. 5) in maintaining full speed through thick fog, and that this violation was "an overriding and major fault" which was the "predominant" cause of the collision (Pet. App. 7, 9). The court found that the *Haiti's* pilot had no reason to suspect the fog enshrouding the *Duke* until collision was imminent (Pet. App. 8), and that in the circumstances he was not negligent in keeping his radar on standby to conserve its working life, since he had no "notice of any need for it" (Pet. App. 9). The Court of Appeals

affirmed the District Court's findings of fact (Pet. App. 12–22).

ARGUMENT

The issues raised by the petition as to the *Haiti's* freedom from fault are factual in nature and were resolved against petitioner by both lower courts. The Fourth Circuit's decision allowing cross-claims in limitations proceedings is clearly correct and is supported by a recent decision of the Second Circuit. There is no conflict of decisions, and hence no occasion for review by this Court.

1. Petitioner argues (Pet. 30–36) that the decision below, exonerating the *Haiti* from fault for failure to consult her radar prior to the collision, is in conflict with several decisions, including one by the Second Circuit. Each of the cases relied on by petitioner, however, involved a vessel which failed to use its radar after some prior warning, either of a possibility of collision or that it could no longer rely on visual lookout.

Thus, *The Medford,* 65 F. Supp. 622 (E. D. N. Y.), and *The Esso Plymouth,* [1955] 1 Lloyd's L. Rep. 429, concerned vessels which knowingly entered fog or smoke banks at full speed without utilizing an available radar instrument. Similarly, *United States* v. *The Australia Star,* 172 F. 2d 472 (C. A. 2), certiorari denied, 338 U. S. 823, held blameworthy a vessel which did not continue to use her radar after repeated notice that a collision with an unlighted ship might be imminent. The Fourth Circuit's holding in this case, far from conflicting with these earlier decisions, recognized their validity (Pet. App. 17) but held that

the *Haiti* had received no such warning in this case. More specifically, the Fourth Circuit affirmed the District Court's finding that the *Haiti* had no reason to believe that it was near fog or that it could not safely rely on visual lookout. Since petitioner admits (Pet. 35, 36) that it is bound by that holding, the distinction between the cases cited by petitioner and the present decision is clear.

Seeking, however, to avoid the effect of the holding, petitioner argues (Pet. 38, 39) that the ever-present possibility of fog in the collision area was sufficient to require the radar-equipped *Haiti* to make use of her instrument, if not constantly, at least at frequent intervals.[2] Petitioner thus not only attempts to undercut indirectly the lower court's find-

[2] Petitioner's argument (Pet. 25–28) that the *Haiti* should have anticipated fog in the vicinity of Galloper Lightship skirts gingerly around the grounds for the lower courts' finding to the contrary. The District Court and the Fourth Circuit found: (1) that visibility was "excellent" at all times after the *Haiti* left Dover; (2) when the *Haiti* reached the vicinity of Galloper Lightship shortly before the collision, she sighted the light immediately; (3) a vessel *coming from the same direction as the Duke* was "plainly seen when as much as four or five miles eastward" only two minutes prior to the collision; (4) Galloper did not report a cloudy condition (not fog) until one half hour after the collision; and (5) vessels in the vicinity reported good visibility prior to and after the collision (Pet. App. 6, 8, 16, 17). It was in these circumstances that the pilot switched the *Haiti's* radar to standby approximately two hours prior to the collision to conserve the life of its cavity magnetron (Pet. App. 16). The Court of Appeals stated that (Pet. App. 16) "It was proved that the delicate cavity magnetron of the *Haiti* radar has a short life, so that the actual use of the radar must be carefully rationed." As petitioner recognizes, it is bound by the finding of the two lower courts that the *Haiti* had no reason to believe that it could not rely on visual lookout.

ing that the *Haiti* had no reason to anticipate poor visibility, but also seeks to place a duty on all radar-equipped vessels to make use of their instruments when operating at night, for the presence of fog, haze, or smoke obscuring visibility can never be entirely discounted at sea.

Far from being a departure from established principles, the decision below is merely an application of well-settled rules that a ship is not unseaworthy because of a failure to carry radar, nor at fault because of neglect to use it, except in circumstances where it has notice of danger which that use might serve to avoid. See *The Prins Alexander* [1955], 2 Lloyd's L. Rep. 1 (House of Lords); *The Southport,* 82 Lloyd's L. Rep. 862; *The Triton-Baranof,* 1953 AMC 393; 1956 AMC 967 (Sup. Ct. Canada). *United States* v. *The Australia Star,* 172 F. 2d 472, 476 (C. A. 2), certiorari denied, 338 U. S. 823; *Pocahontas Steamship Co.* v. *The Esso Aruba,* 94 F. Supp. 486, 490 (D. Mass.), affirmed, 197 F. 2d 422 (C. A. 1); *Anglo-Saxon Petroleum Co.* v. *United States,* 88 F. Supp. 158 (D. Mass.); *Wood* v. *United States,* 125 F. Supp. 42, 51 (S. D. N. Y.). Moreover, since the collision would not have occurred in the absence of the *Duke's* extreme and overriding fault, implicit in petitioner's argument is the contention that the *Haiti* should have anticipated and guarded against violations of the rules of navigation on the part of other vessels—a standard of care rejected by American courts. *Bradshaw* v. *The Virginia,* 176 F. 2d 526, 530 (C. A. 4); *The Kaiserin Maria Theresa,* 149 Fed. 97,

99 (C. A. 2), certiorari denied *sub. nom. Palson* v. *North German Lloyd*, 204 U. S. 671.

What petitioner actually asks, therefore, is that this Court impose an entirely new navigational rule on seagoing vessels (as distinguished from vessels operating in coastal or inland waters). No admiralty court has yet gone so far as to require the use of radar in clear weather. And an accurate evaluation of such a requirement would necessitate the resolution of a variety of complex international and technical problems, many of which are still under study. Under these circumstances, and in view of the findings of both lower courts that the *Haiti* was not at fault, we submit that this Court should not undertake to decide whether the new rule proposed by petitioner should be adopted.[3]

[3] Petitioner's discussion of the utility of radar (Pet. 38, 39) amounts to an oversimplification of a very complex question. Although a useful ranging device, radar can be a dangerous substitute for vigilant lookout and ordinary seamanship (as recent charges stemming from the *Andrea Doria* disaster may illustrate). See *The Cause of Collisions at Sea with Radar*, 8 Journal Institute of Navigation (London 1955), pp. 124, 125; 8 Merchant Marine Council Proceedings (1951), p. 199; Wylie, *Use of Radar at Sea*, Institute of Navigation (London 1953), *passim;* Williams & Bartlett, *Visibility on Cathode Ray Tube Screens; Problems and Methods*, 25 Journal of Psychology (1948), p. 402. *United States* v. *Beck*, 1954 AMC 765 (D. N. J.). Radar is chiefly useful in situations of poor visibility, for its resolving power in clear weather is far inferior to the human eye. Isbister, E. J., *New Marine Radar*, Radio Technical Commission for Marine Services Proceedings (Boston 1954), p. 31.

Moreover, it is only a step (but we think, a logically necessary step) from requiring a radar-equipped vessel to use her instrument at all times after dark to a requirement that all seagoing vessels be equipped with radar. While this innovation may come in time, imposition of such a requirement, involving as it does the resolution of difficult technical issues, should better be left to Congress or international regulatory bodies.

2. Petitioner's second contention (Pet. 40–46), that the *Haiti* violated the rule (Article 16; Pet. 5) requiring a vessel that hears a fog signal forward of her beam to stop her engines "so far as the circumstances of the case admit" involves only a question of fact and requires little discussion.

Both lower courts held that the *Haiti's* pilot acted promptly and in compliance with Article 16 in stopping his vessel's engine after identifying the *Duke's* whistle off his starboard bow. As petitioner itself recognizes in another context (Pet. 35, 36), the lower courts' findings are conclusive on it here. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 99; *Just* v. *Chambers*, 312 U. S. 383, 385; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 13; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 63.

It is clear in any case that the *Haiti's* pilot, in stopping the vessel's engine within a matter of seconds after the whistle was heard, acted in compliance with Article 16, for the language of that Article recognizes that each situation must be governed by its particular facts and presupposes at the very least a reasonable opportunity to identify a noise heard. *The Umbria*, 166 U. S. 404; *Johnston-Warren Lines* v. *United States*, 196 F. 2d 689 (C. A. 2); *Steffens* v. *United States*, 32 F. 2d 206 (C. A. 2).[4]

[4] Compare *Lie* v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291 (affirming that a ship's master violated Article 16 in wasting sixteen minutes before stopping his engines after first hearing a fog signal), and *The Silver Palm*, 94 F. 2d 754, 776 (C. A. 9) (holding the commodore of a naval flotilla, proceeding at eighteen knots through a dense fog bank in "reckless disregard of other vessels," violated Article 16 in reducing his speed to only twelve knots on hearing a whistle ahead in the fog).

3. Petitioner also contends (Pet. 8–24) that the Court of Appeals erred in holding that, under Rule 56 of the Admiralty Rules, one claimant in a limitation proceeding can cross-claim against another for damages arising out of the collision or other occurrence involved in the same proceeding. In particular, petitioner asserts that the decision below is in conflict with the Fifth Circuit decision in *Department of Highways of State of Louisiana* v. *Jahncke*, 174 F. 2d 894. We believe that the decision below, which is supported by a recent holding of the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon* (No. 23960, June 29, 1956), is entirely reconcilable with the *Jahncke* case, and that the court below reached the only result consistent with this Court's decisions and modern procedural practice.[5]

The limitation proceeding provided by 46 U. S. C. 181 *et seq.* was characterized by this Court in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 215–218, as having two purposes: (a) to permit the shipowner, if found liable, to establish his eligibility for the liability limitation provided by federal law; (b) to provide a forum where all

[5] The United States did not file a cross-claim against the *Duke* for damage to its vessel because its counsel were of the opinion that it had waived recovery of any claim against a vessel of the British Government as a result of the "Knock for Knock" Agreement between the United States and the United Kingdom, 56 Stat. 1780, E. A. S. 282, December 4, 1942. Subsequently, while the appeal was pending, the British Government through official channels informed the United States that it does not regard the *Duke* as a Government vessel. Accordingly, following the Court of Appeals decision, the United States, relying on that holding, filed a cross-claim against the *Duke* in the proceedings before the District Court.

persons interested in a collision or other marine accident can obtain a "settlement of the whole controversy over such losses as are comprehended within it" (*id.* at 215–216). Cf. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 415, 416. It is the latter purpose which is furthered by the ruling below.

In the *Hartford Accident* case, *supra*, unanimously holding that an admiralty court retains jurisdiction over the parties to a limitation proceeding even after it has denied the petitioner both exoneration and limitation of liability, this Court stated (*id.* at 216):

> The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy * * *.

After concluding that the statute must be given "a very broad and equitable construction for the purpose of carrying out its purpose" (*id.* at 215), the Court commented (*id.* at 217):

> If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute.
>
> Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where

> a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief * * *.

Both the holding and the language of Chief Justice Taft's *Hartford Accident* opinion were reaffirmed by Chief Justice Hughes speaking for the Court in *Just* v. *Chambers,* 312 U. S. 383, 385–387, also a unanimous decision. Cf. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413–423. It was in the light of this strong mandate for a liberal construction that the court below held that claimants in a limitation proceeding can cross-claim for damages arising out of the same occurrence.

There can be no doubt that, if the United States had not petitioned for limitation of liability, claimants against it in proceedings *in rem* or *in personam* could have cross-libelled one another. Admiralty practice offers the greatest flexibility in allowing both libellants and respondents to cross-libel *inter se* in order to settle finally all rights and liabilities arising from a single marine accident. *The Eliza Lines,* 61 Fed. 308, 324 (C. C. D. Mass.); *The City of Boston,* 182 Fed. 171 (D. Mass.); *The West Katan,* 28 F. 2d 638 (W. D. Wash.). Cf. *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U. S. 629, 636, 637. Thus, if petitioner (and the passenger claimants) had libelled the United States, the United States (and the libellant passengers) could have cross-libelled petitioner by obtaining service on its counsel in the same proceeding. Apart from the limitation petition in this case, therefore, the rights of all parties could have been finally

determined in one proceeding. There appears to be no reason why a different rule should prevail in a limitation proceeding. Indeed, every dictate of modern pleading theory is to the contrary. Cf. *Petition of Texas Co.*, 81 F. Supp. 758 (S. D. N. Y.).

The court below relied on two established principles in deciding that a limitation petition brought by one party to a marine accident does not necessarily result in other libellants in the same proceeding losing the right to claim *inter se:* (a) "all rights, if this can fairly be done, should be decided in a single legal proceeding," and (b) "parties who submit themselves to the jurisdiction of a court * * * should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding" (Pet. App. 21, 22). Applying these principles, the court concluded that the advantage of ensuring complete disposition of all claims in a single proceeding far outweighed any possible disadvantage to the claimant which is seeking at once to press its claim and also to avoid having to answer for its own fault in the same proceeding. Accordingly, the court below, being conscious of the view taken by this Court in *Hartford Accident* and recognizing the flexible and non-technical nature of admiralty practice, held that Rule 56 allowed the cross-claims between parties already before the court.

This decision has been expressly approved by no less an admiralty court that the Court of Appeals for the Second Circuit in a unanimous opinion holding, on a closely related issue, that a petitioner in limitation could cross-claim against other claimants in the

same proceeding. *Moore-McCormack Lines, Inc.* v. *McMahon,* No. 23960, June 29, 1956, slip opinion, pp. 2–4, 6. The Second Circuit's opinion, which relies on its earlier holding in *The Steel Inventor,* 43 F. 2d 958 (C. A. 2), certiorari denied, 283 U. S. 819, leaves no doubt that it would adopt the result reached by the Fourth Circuit in this case, and the two holdings in combination have the effect of ensuring the same final disposition of all issues in one limitation proceeding as in the ordinary libel *in rem* or *in personam.* Read together, the decisions of the Second and the Fourth Circuits provide an authoritative guide to the procedure to be employed in limitation proceedings.

Nor is there any conflict between the rule of these two decisions and the holding of the Fifth Circuit in *Department of Highways of State of Louisiana* v. *Jahncke Service, Inc.,* 174 F. 2d 894. On the basis of the *Jahncke* opinion and the briefs in that case, the court below concluded that the Fifth Circuit's decision was distinguishable on its facts (Pet. App. 19). In *Jahncke,* a claimant in limitation proceedings sought to implead a third party which had not submitted itself to the jurisdiction of the court by filing a claim against the petitioner. The Fifth Circuit held that the "origin, nature and extension of the third party practice" under Rule 56 indicated that the rule was not intended to permit the impleading of third parties in limitation proceedings. While, arguably, it might be thought desirable that limitation claimants be permitted to implead third parties on claims arising from the same occurrence, such a rule

obviously would raise problems not present in the instant decision which allows cross-claims only against those parties who are seeking recovery on their own behalf and hence are already before the court. Whatever the merits of the *Jahncke* decision, therefore, the issue there decided was entirely apart and distinct from the issue in this case and the Fifth Circuit's ruling is fully reconcilable with the ruling of the court below.[6]

CONCLUSION

The petition in this case raises two factual issues resolved against the petitioner by both lower courts, as well as a question of admiralty procedure which has been decided contrary to petitioner's position by two courts of appeals and on which there is no conflict of decisions.

---

[6] Petitioner also claims (Pet. 17–24) that it is unjust as well as impractical to subject it to suit by service on its counsel as the price for hearing its claim against the United States. The rule sought by petitioner would of course be an exception to the general principle that one seeking recovery in a law suit submits himself to the jurisdiction of the court for purposes of setoff or cross-claim against him with respect to the same occurrence. The short answer to petitioner's argument, however, is that it would be subject to exactly this result in an ordinary libel proceeding, and it has offered no reason, other than its own convenience, why the rule should be different in limitation proceedings. Compare with petitioner's arguments (Pet. 17–24) regarding the practicality of allowing cross-claims, Mr. Justice Holmes' opinion in *The Titanic*, 233 U. S. 718, 731, 734; brushing aside objections that a limitation proceeding involving a foreign vessel might not bar foreign claimants, and Professor Robinson's comment on the same problem (*Admiralty*, p. 904), that "These complications cannot be avoided, so long as 'justice' is a variable in time and place, in an international subject matter like maritime law."

The decisions of the Courts of Appeals for the Fourth and the Second Circuits on the procedural issue are clearly correct, and can be taken to have settled the law on the availability of cross-claims in limitations proceedings. The decisions of the two courts below exonerating the *Haiti* turn on the facts of this particular case, and raise no issues of general importance appropriate for decision by this Court.

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the

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October Term, 1956

No. [redacted] 247

BRITISH TRANSPORT COMMISSION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, ETC.,
Respondent

Brief in Opposition to Petition for a Writ of Certiorari, on Question of Cross-Libels

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In the

Supreme Court of the United States

October Term, 1956

No. 249

BRITISH TRANSPORT COMMISSION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, ETC.,
Respondent

Brief in Opposition to Petition for a Writ of Certiorari, on Question of Cross-Libels

The ruling of the Court of Appeals in the instant case on the question of cross-claims between co-claimants is completely in accord with established practice and need not be reviewed by this Court. It has within the past two months been approved by the Court of Appeals for the Second Circuit. *Moore-McCormack Lines, Inc. v. McMahon*, ... F. 2d ..... (Docket 23960).

This Court has for many years spoken of the procedure under the limitation statutes as a settlement of a many cornered controversy. *The City of Norwich*, 118 U. S. 468. Historically the purpose of the statutes was to limit the potential losses of the enterprising ship owner to the amount at stake, the vessel and her freight. The procedure to be

followed by the Courts was not set out by Congress except for the provision that limitation would be by "appropriate proceedings." This Court in 1872 published Admiralty Rules numbered 54, 55, 56 and 57 which were amended in 1920 to become Rules numbered 51, 52, 53 and 54, and which today are the same. The statutes have been liberally construed from time to time by this Court to carry out the broad principles declared by Mr. Chief Justice Taft in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Railroad Company*, 273 U. S. 207, of disposing of all sides of a multi-cornered dispute in an equitable manner.

It must not be forgotten, however, that limitation or exoneration is merely a statutory defense raised by the ship owner which may grant him partial or complete relief from all of his debts. In the same way the bankruptcy court grants relief to the debtor by marshalling all of his assets, paying off his debts to the limit of his assets and within certain limits relieving him of any further claims on the past indebtedness. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Railroad Company, supra.*

The fact remains that each claim in the limitation proceeding is brought as a libel would be brought and each claimant has the same standing as any other libellant and is therefore subject to the same responsibilities as any other libellant who sues jointly or whose suit is consolidated with that of others because arising from the same state of facts. *The Steel Inventor* (CCA 2d, 24 F. 2d 657), cert. den. *sub nomine Bell* v. *U. S. Steel Products Co.*, 283 U. S. 819.

A petition for limitation may be sought either before or after libels have been filed against the vessel owner. In the instant case a petition for limitation was filed before any libels were filed. If on the other hand the British Ministry

of Transport or any other claimant had filed a libel in the District where the vessel was found, which could readily have been done, the present confusion over the question of cross-libels would not have occurred. It appears clear that the learned District Judge as well as the Court of Appeals for the Fifth Circuit on whom he relied, see *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949), failed to make this distinction. The petition for limitation does not change the form of the action which is fundamentally a consolidated suit by various libellants against one respondent. The petition merely sets forth the relief prayed for, namely, limitation of liability. Exoneration as in any answer is also sought. A cross libel may be filed and served on proctors for a cross-respondent. *The Elisa Lines* (CCA), 61 Fed. 308. *Dea* v. *Wrightson*, 26 F. 2d 175, cert. den. 278 U. S. 623. Also see: *Washington Southern Navigation Co.* v. *Baltimore and Philadelphia SS Co.*, 263 U. S. 629. Under Admiralty Rule 56, the many cornered controversy is easily settled in one proceeding. The liberal joinder of actions by the same parties is approved in *Benedict on Admiralty* (6th Edition), Vol. 2 at pages 39-40:

> "While the Supreme Court has left open the general question whether joinder of proceedings is proper, *The Corsair* (1891), 145 U. S. 335, the lower courts have been liberal in sustaining libels which join causes in rem and in personam (citations omitted), as indeed would seem only proper in view of the fact that in many instances the broadest concourse of parties can be compelled by a petition for limitation of liability, embracing causes of action both in rem and in personam, and in view of the further fact that impleader of third parties is freely encouraged under the 56th Rule."

The same reasoning should permit all co-libellants or any other person who is liable for the occurrences in question to be brought in to avoid multiple and costly litigation.

Procedural rules for limitation cases have always been set by this Court ever since *Norwich Transportation Co.* v. *Wright*, 80 U. S. 104. See *The Atlas*, 93 U. S. 302. In most instances this was done without specific instructions from Congress because only the general words "appropriate proceedings" were used in the Statute and this Court has taken on the task of defining the appropriate proceedings. See *The Benefactor*, 103 U. S. 239 (1880) (rule later changed by amendment in 1936 to 48 U. S. C., Sec. 183); *The Scotland*, 105 U. S. 24; *City of Norwich*, 118 U. S. 468 (1885); *La Bourgogne*, 210 U. S. 95 (1908).

In 1889 Supreme Court Rule 57, now Rule 54, was promulgated permitting the shipowner to file an affirmative petition for limitation before any suit was begun against the vessel. This is the procedure followed by the petitioner, the United States in the instant case and is now the customary manner of proceeding although it is still proper to proceed with a petition to limit if brought within six months of notice of the first claim or the filing of the first libel. 48 U. S. C. 183.

The result should be the same in each instance. If a respondent who is libeled can cross-libel before he files a petition for limitation there is no reason why he should not be allowed to do so after or concurrently with his petition for limitation. Equally clear is the right of co-libellants to cross-libel under Rule 56 for damages arising out of the same occurrence or even bring in third parties who are responsible if the basis of the action is the same.

The Court of Appeals for the Fifth Circuit has, we con-

tend, missed the point which has now been set out by the Court of Appeals for the Fourth Circuit in the instant case and the Second Circuit in the *Moore-McCormack Lines, Inc.* v. *McMahon, supra*. In *Department of Highways* v. *Jahncke*, 174 F. 2d 894 (CCA 5th, 1949), the petitioner for limitation sought to implead under Rule 56 a third party alleged to be jointly liable to the claimants. This was denied on the basis of appellee's contention, that a limitation proceeding is a special statutory proceeding not embraced within the language of Rule 56 which specifies that it is applicable only to "a suit in rem or in personam." The court has failed to note that limitation is merely a limit on the remedy in amount together with a concourse of all claims which may be instituted after or before claims or libels are brought. *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons*, 336 U. S. 386. Reliance was placed by the Court on *Poling Bros.*, 1937 A. M. C. 1513 (EDNY) and *Petition of the Texas Company*, 81 F. Supp. 758. In *Poling Bros., supra*, Byers, District Judge, denied the motion of impleader solely on the ground that the issues to be decided on impleader were foreign to the issues already decided on the collision case on the merits. This, of course, is proper under the rule.

In *The Petition of the Texas Company*, 81 F. Supp. 758 (DC EDNY) (1948), Liebell, District Judge, declined to grant process *in rem* and *in personam* to the petitioner against the opposing claimant at that time but stated that petitioner was entitled to an answer to the petition for limitation and that if the vessels were found equally at fault, the claimant would only be entitled to half his damages and the Texas Company, petitioner, could set off by way of contribution, one half of the amount paid to other claimants.

The practical result obviously is the same as if Rule 56 had been followed. As Liebell, J., states at page 762:

> "To permit Verbesky (claimant) to collect on his claim for damage to the *Victory II* in the limitation proceeding, if both vessels were at fault, would not be equitable."

It would be equally inequitable for the *Duke of York*, found solely at fault, to withdraw from the proceedings and avoid all liability in this jurisdiction forcing all claimants to proceed by separate actions long after the collision occurred even though the decision here may be *res adjudicata*. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708. Learned Hand, C. J., has been quoted in the last case cited to the effect that "At no time can the owner recover a dollar by means of it (the limitation proceeding) from anybody." This is undoubtedly true to the degree stated, namely, that limitation in and of itself is merely a limit to the remedy. In the case of one claimant, it is the same as an affirmative defense either partial or complete, depending on whether limitation or exoneration is allowed. *The Scotland, supra*. Furthermore, in the case of multiple claims it is procedural, bringing into concourse all the claims for final adjudication. But limitation *per se* puts no restraint on the petitioner or any of the claimants. Nothing is said in the act which forbids either from suing another party to determine ultimate liability. Once the Court assumes jurisdiction of the collision, the rights of all parties should be determined. *The Steel Inventor, supra*.

As stated by Chief Judge Clark in the *Moore-McCormack Lines* case, *supra*, drawing on the authority of *The Steel Inventor, supra*:

> "As stated, we think there is authority (to permit cross claims); but in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids."

Proctors for the Ministry of Transport raise the doubt that when the cross-claims are brought against them, they may not be able to petition for limitation citing *The Algoma* case, *supra*. Hand, J., merely stated that as things then stood, on the record, the Railroad could not petition for limitation because it had not been sued by the opposing petitioner. From there he went on to describe the limitation petition as a defense and a remedy for the concourse of claims for convenient disposition. As far as the petition alone is concerned it seeks no affirmative relief. But there is nothing in the limitation acts to prevent the cross-claims and the Courts have readily given credit for damages in mutual fault cases even where no cross-libel was filed. *The Albert Dumois*, 177 U. S. 240.

The history of Rule 56, previously Rule 59 reveals an equally sound disposition by this Court to employ the rule to do justice under the circumstances. The rule was first promulgated in 1883 apparently to overcome the injustice described by Addison Brown, J., in *The Hudson*, 15 Fed. 162 of a damage claimant arbitrarily suing only one of the vessels involved in a collision. After reviewing the English and American practice, Judge Brown determined that in all justice the respondent vessel owner should be allowed to bring in the other vessel responsible for the collision so that the liability of each could be ascertained at one time. The rule originally referred specifically to collision cases but as

amended has been applied to all cases within the Admiralty jurisdiction. *Aktieselskabet Fido* v. *Lloyd Braziliero*, 283 Fed. 62; *The Alert*, 40 Fed. 836.

Objection has been raised that subjecting the claimant, Ministry of Transport, to cross-claims is unfair and novel. Quite to the contrary as Liebell, District Judge, stated in the *Texas Petition*, *supra*, it is not equitable to allow the claimant to recover in full where both vessels are found at fault.

The Court has in all cases since *The Albert Dumois*, 177 U. S. 240, allowed a reduction in the amount of the claimant's award before limitation is applied where both vessels are held at fault. Thus even though the petitioner makes no cross-claim, he is entitled to a credit for his damages. Furthermore, any damages which are recovered must be added to the limitation fund (*Reynolds* v. *Vanderbilt*, 106 U. S. 47; *Phillip* v. *Clyde Steamship Co.*, 17 F. 2d 250 (CCA 4, 1927). In *Reynolds* v. *Vanderbilt*, *supra*, the English case of *The Seringapatam*, 2 W. Robinson 506 and 3 W. Robinson 38, was discussed with approval leading to the conclusion that the claimant vessel owner seeking damages must give credit for the damages his own vessel causes where both are to blame. In the English case Dr. Lushington put the claimant vessel owner on terms to accept half damages even though the cross-libel of the petitioner had been abandoned because no process was served. (Substituted service on a non-resident's attorney was not permitted until 1859. *The Rougemont* [1893] P. 275.) The justice of such a rule is clearly apparent.

The rule of the Court of Appeals in the instant case and that of the Second Circuit in the *Moore-McCormack Lines, Inc.* v. *McMahon*, *supra*, is clearly the reasonable expression

of the long established tradition of this Court to adopt the procedure which will best give just and equitable results. The petition for writ of certiorari on this question should be denied as not required under the circumstances.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE U. S. N. S. "HAITI VICTORY"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order and opinion of the District Court (R. 58, 59) dismissing cross-claims against petitioner are not reported. The opinion of the District Court (R. 64–71) exonerating the United States from liability is reported at 131 F. Supp. 712. The opinion of the Court of Appeals (R. 77–88) is reported at 230 F. 2d 139.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1956 (R. 88–89). By order of the Chief Justice on April 10, 1956, the time for filing

a petition for a writ of certiorari was extended to July 12, 1956. The petition for a writ of certiorari was filed on July 11, 1956, and granted, limited to the question stated below, on October 8, 1956 (R. 90). 352 U. S. 821. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Court in its order granting certiorari (R. 90) limited its review to the first question presented by the petition:

> 1. * * * The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision.

The United States suggests that the question before the Court is more accurately stated as follows: whether those who are already parties to an admiralty limitation proceeding may cross-claim against each other for damages arising out of the same maritime accident involved in the proceeding.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Shipowner's Limitation of Liability Act and this Court's General Admiralty Rules are set forth in the Appendix, *infra*, pp. 64–72, and at pp. 44–50 of the petitioner's brief.

STATEMENT

Petitioner is a claimant in a proceeding brought in the District Court for the Eastern District of Vir-

ginia by the United States as owner of the Naval Transport *Haiti Victory* for exoneration from, or limitation of liability for, loss or damage resulting from a collision between that vessel and the overnight ferry, *Duke of York*, owned by petitioner, in the North Sea (R. 22). During the pendency of the proceedings, other claimants against the *Haiti* filed cross-claims against the *Duke* to recover for death, personal injury, and loss of baggage (R. 12–21). In addition, the United States made a claim against petitioner for damage to its vessel, which it asserted as an "offset" and a "cross-claim" in its answer to petitioner's claim (R. 32–33).

The District Court, in a memorandum opinion, held that the claimants could not cross-claim against another claimant, such as petitioner, and dismissed the cross-claims (R. 58, 72). Subsequently, at the trial of the limitation proceeding, the District Court exonerated the United States from all liability, holding the *Duke* solely to blame for the collision (R. 64). Petitioner and the other claimants then appealed to the Court of Appeals for the Fourth Circuit. Although not itself noting an appeal, the United States filed a formal cross-assignment of error asserting that the District Court had denied "to [the United States] their right to cross claim and implead the owners of the *Duke of York*" (R. 74).

The Court of Appeals sustained the District Court in finding the *Duke* solely at fault, but reversed the District Court's order refusing to hear cross-claims between claimants in a limitation proceeding (R. 77–

88). All claimants sought review by this Court.[1] The Court granted certiorari limited, as stated above, to the first question stated by petitioner, *i. e.*, whether claimants in admiralty limitation proceedings could cross-claim (R. 90).

SUMMARY OF ARGUMENT

I

Proceedings for limitation of the shipowner's liability have never been entirely defensive in nature. From the time of their origin late in the 19th century, they have been characterized by an extremely flexible procedure, providing, where appropriate, the benefits both of a *concursus* of claims against the petitioning shipowner, and a cross-libel in which all claims arising from a single maritime incident are finally determined.

This Court, in adopting rules of practice for the limitation proceeding, made it clear that it did not intend to foreclose the development of alternative procedures by the lower admiralty courts. Nothing in this Court's general admiralty rules forbids utilization of the customary admiralty cross-claims practice in shipowner's limitation proceedings.

With the exception of a single district court ruling (which was in effect subsequently overruled by the court of appeals for the circuit in which the district

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[1] The passenger claimants filed a petition for a writ of certiorari from that part of the Court of Appeals judgment exonerating the *Haiti* from liability. *Arthur Goodman, et al.* v. *United States*, No. 249. This Court denied the petition on October 8, 1956. 352 U. S. 838.

court is located), cross-claims between parties in limitation arising from the subject matter of the proceeding have been allowed in every case where the question has been presented. *Department of Highways of State of Louisiana* v. *Jahncke*, 174 F. 2d 894 (C. A. 5), relied on by petitioner, refused impleader against a non-party on a claim that was separate from the subject of the limitation proceeding; hence, it has no real bearing on the present issue.

Moreover, absence of express authority for cross-claims practice in this Court's General Admiralty Rules does not constitute a bar to this procedure. The General Rules have never been intended to be exhaustive of allowable admiralty procedures, for the lower admiralty courts have always been free to adopt procedures so long as they are not inconsistent with the Rules. Further, the existing admiralty cross-claims practice in libels *in rem* and *in personam* has been built up "by analogy" to one or more of the Rules, although it is not provided for in these Rules.

Thus, the court below was sustained by precedent and authority when it referred to Rule 56 in allowing cross-claims in admiralty limitation proceedings, although it would have had power to adopt such a procedure even apart from the General Rules.

II

The availability of admiralty cross-claims practice in limitation proceedings is supported not only by the history of limitation, but by the dual purpose of the

American limitation proceeding which, unlike its European counterparts, must provide both a concourse of claims and at the same time resolve all rights and liabilities arising from a single maritime accident or event.

Since, under substantive maritime law, the liability of all parties must be determined in the course of passing upon the petitioning shipowner's fault, and the limitation decree will be *res judicata* as to such liability, there is no good reason why claimants and other parties should not be permitted recovery in the limitation proceeding, rather than being forced to resort to functionally useless collection suits, often in foreign forums. Cross-claims are allowed in equity receiverships and summary bankruptcy proceedings where necessary to the disposition of debtors' estates. No convincing argument has been advanced as to why the rule in admiralty should be different, especially when it is recognized that the admiralty has led, rather than followed, in the development of a flexible cross-practice.

III

There is nothing unfair or impractical about the practice of cross-claims in admiralty limitation. A claimant who seeks to press his own claim in a judicial proceeding should be subject to offsetting claims arising from the same transaction, unless there are compelling reasons to the contrary. In fact, there is no prejudice to claimants in being subjected to offsetting claims in limitation. Most limitation claimants against whom there may be claims are foreign and

domestic shipowners who are already subject to suit in an American jurisdiction and who, in the event of claims, will be able to file their own limitation petitions. It is unlikely, therefore, that foreign claimants will be substantially deterred from claiming in American limitation proceedings, or that the concourse will be rendered ineffective.

The distinction between American and European practice raised by petitioner merely highlights the appropriateness of cross-claims in American limitation. The British and continental proceeding is a pure *concursus*, held only after the liability of all parties to a maritime accident has been determined, either by stipulation or in a prior proceeding. The American proceeding, in marked contrast, must determine its parties' liabilities as well as provide for the right to limit. Thus, while cross-claims are necessary in American proceedings, they would serve no useful purpose in the British concourse.

ARGUMENT

INTRODUCTION: THE INTEREST OF THE UNITED STATES

At the outset, we are confronted with petitioner's contention (Br. 4) that no interest of the United States is involved in this proceeding, since "no claim or right of the United States has been passed upon by the courts below." This contention, however, ignores the fact that the United States has an unquestioned claim (actually a counterclaim) against petitioner for damage to its vessel, which it asserted as an "offset" and a "cross-claim" in its answer to

petitioner's claim (R. 32–33).[2] Under petitioner's view of the applicable law (Br. 21), adopted by the District Court but rejected by the Court of Appeals, the United States cannot enforce that claim in this proceeding.

After the District Court's decree, the United States filed a formal cross-assignment of error asserting that the court had denied "to [the United States] the right to cross-claim and implead the owners of the SS. *Duke of York*" (R. 76). Under established admiralty practice, although the United States did not note an appeal, the question raised by its cross-assignment was before the court below. 4 Benedict, *Admiralty* (6th Ed.), §§ 571-572. The question may, therefore, properly be brought before this Court.

Moreover, there can be little doubt that, practically speaking, this Court in reviewing the decision below will in all probability also determine the right of limitation petitioners, including the United States in this case, to cross-claim against claimants; for the rights of all parties in this regard are so closely connected that there would appear to be little justification for allowing the claim in one case and denying it in another. See *infra*, p. 25.

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[2] A cross-claim and setoff can be presented by an answer in admiralty. *Esso Standard Oil Co.*, v. *United States*, 174 F. 2d 182 (C. A. 2).

In addition, following remand of the case by the Court of Appeals, and prior to the petition for certiorari, the United States, relying on the decision below, filed a cross-claim in the District Court seeking an affirmative recovery against petitioner for damages arising from the collision.

Hence, in our view, the true issue before the Court is not merely, as petitioner would have it (Br. 4, 5), the narrow one of whether certain passenger claimants can recover against it below, but the more general issue of whether admiralty cross-claims practice is available as between co-parties in an admiralty limitation proceeding with respect to claims arising out of the subject matter of the proceeding. On the other hand, there is no problem on this record of impleading[3] third parties—strangers to the proceeding—for the purpose of asserting cross-claims against them; all the cross-claims involved here, whether asserted by the United States or by the passenger claimants, are cross-claims between those who are already parties. Nor is there any problem on this record concerning unrelated cross-claims; all the cross-claims involved here stem from precisely the same marine accident which is the basis of petitioner's claim against the United States. To repeat, the true question here is whether admiralty cross-claims practice is available as between co-parties in an admiralty limitation proceeding with respect to claims arising out of the subject matter of the proceeding; all else is unnecessary to a decision in the case, but at the same time the issue is no narrower than we have stated it. To that question, we now turn.

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[3] The term "impleader," sometimes used loosely to refer to all forms of cross-action, is here reserved for claims asserted against persons not party to the limitation proceedings, to avoid confusing the two types of claim. The general term "cross-claim" is used in this brief to refer to claims against claimants already party to a limitation proceeding, whether asserted by a limitation petitioner or by other claimants.

I

A PROCEEDING FOR LIMITATION OF A SHIPOWNER'S LIABILITY IS SUFFICIENTLY FLEXIBLE TO ALLOW DISPOSITION OF ALL CLAIMS BETWEEN CO-PARTIES ARISING FROM THE SUBJECT MATTER OF THE PROCEEDING

The main thrust of petitioner's argument (Br. 9–22, 31–36) is that the decision below amounts to a departure from well-established admiralty practices and principles, a departure which is unwise and should be firmly repressed by this Court. Petitioner argues that cross-claims[4] have never been allowed in limitation proceedings under Admiralty Rule 56, since those proceedings, in their origin and development, have been entirely defensive in nature, permitting claims and recovery only against the limiting shipowner.

The question of an appropriate cross-claims procedure for admiralty limitation proceedings is one of first impression here, which, we submit, this Court should and will decide primarily on the basis of current needs and conditions. But petitioner's description of the origin and history of admiralty limitation should not go unanswered, since the history of limitation throws much light on its essential character and purpose. Nothing could be less correct than that an admiralty limitation is a specialized proceeding in which the traditionally flexible procedure of the admiralty cross-libel is unavailable.[5] Since

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[4] See note 3, *supra*.

[5] On the traditionally flexible and convenient procedure of admiralty, and in particular its broad use of the cross-libel, see *infra*, pp. 44–46.

an early date, admiralty has permitted cross-claims, in appropriate cases, between parties already before the court in limitation proceedings, and the notion that the proceeding is entirely defensive in character is of recent origin.

In the next several pages, we shall attempt briefly to place the modern admiralty limitation proceeding in its historical context. We hope thereby to show that nothing in the history of limitation precludes, and much supports, adoption or reaffirmation by this Court of a flexible cross-claims limitation procedure. We will then argue that such a procedure is not only historically well founded but also practical and equitable in the light of today's practice (*infra*, pp. 40–63).

A. ADMIRALTY LIMITATION HAS ITS ORIGIN BOTH IN STATUTE AND RULE, NEITHER OF WHICH PRECLUDED CROSS-CLAIMS

Although limitation of the shipowner's liability came relatively late to American law and was never a part of the mecantile law of England, far from constituting a "legislative graft upon the principles of admiralty", as petitioner asserts (Br. 9), its roots are deep in the general maritime law of medieval Europe. *The Main* v. *Williams*, 152 U. S. 122; Holmes, *The Common Law*, pp. 6, 30. The present American statute (R. S. 4283–4285, *infra*, pp. 64–67) stems from an Act of Congress of March 3, 1851 (9 Stat. 635), which, in turn, was based on earlier English statutes which had adopted the general maritime rule. *Norwich Co.* v. *Wright*, 13 Wall. 104, 117–119. The purpose of the Act, as early described by this Court (13 Wall. at 121), was "to encourage ship-

building and to induce capitalists to invest money in this branch of industry," inasmuch as such investors incur a "very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount."

The provisions of the original 1851 Act, which have a direct relevance to this proceeding, can be briefly summarized. Section 3 (9 Stat. 635) provided that the liability of shipowners for damage arising from the operation of a vessel "without the privity or knowledge of such owner or owners" should be limited to "the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending". Section 4 of the Act authorized apportionment of the owner's interest among the various claimants if the total claims exceeded the interest, and authorized the owner or claimants to bring "appropriate proceedings" for that purpose; and Section 4 further provided that an owner, if entitled to limit, could be quit of further liability by transferring his interest in the vessel and her pending freight to a trustee appointed by the court for benefit of the claimants. The Act was sketchily drawn and, for twenty years following its enactment, little noticed in the reports.

In 1866, the steamship *City of Norwich* collided with a schooner in Long Island Sound. The schooner was lost, and its owners libeled the *Norwich's* owners *in personam* in the District of Connecticut and obtained a decree that the steamer was at fault. Before that decree, cargo claimants had libeled the *Norwich*

in rem in the Eastern District of New York. The *Norwich's* owners, relying on the 1851 Act, petitioned for a concourse of claims in the Connecticut proceeding, asserting that their interest in the ship and her freight was less than the combined claims for the loss of the schooner and the cargo claims, and asking for apportionment of that interest among the respective claimants. The District Court denied the petition for want of jurisdiction, and the Circuit Court affirmed on a different ground. On writ of error Mr. Justice Bradley, after first reviewing the background of the limitation statute, concluded for the Court that the *Norwich's* owners were entitled to limit their liability to their interest in the vessel and its freight. *Norwich Co.* v. *Wright,* 13 Wall. 104. The Court pointed out, however, that the limitation petition should have been filed in the New York proceeding which had jurisdiction over the *Norwich,* not in the Connecticut suit *in personam,* but added that "want of any uniform practice on the subject may, perhaps, be a sufficient excuse for not having done this" (13 Wall. at 126).

The opinion then outlined the proper procedure for invoking limitation, later to be elaborated in four new general admiralty rules (Rules 54–57) promulgated in the same term (13 Wall. XII–XIV). Rule 54 (now Rule 51) provided for a petition in the "proper District Court" alleging facts and circumstances entitling the owner to limitation, and for an appraisement or stipulation as to the owner's interest in the vessel and her freight, and for payment of the amount of that "interest" into court; alternatively, the rule pro-

vided for a transfer of the owner's interest to a trustee appointed by the court. On compliance with this procedure, the owner was entitled to a monition to all claimants to appear and present their claims in the concourse, and for an injunction against the prosecution of such claims elsewhere than in the limitation proceeding (13 Wall. at XII–XIII). Rule 55 (now Rule 52) provided for proof of claims before a commissioner and distribution of the proceeds of the vessel and freight *pro rata* among the claimants (13 Wall. at XIII). Rule 56 (now Rule 53) made it clear that (unlike the British rule) the shipowner could seek complete exoneration in the limitation proceeding, and provided that claimants could challenge the petitioner's right to exoneration or limitation by answer to the petition (13 Wall. at XIII). Finally, Rule 57 (now Rule 54) provided that venue for a limitation petition lay (1) in a district where the vessel had been libeled or (2), if the vessel had not been libeled, then in the district in which the owner had been sued.*

It is clear, therefore, that the present-day limitation proceeding stems from two sources: The 1851 Act, which provided the substantive right of limitation but only a bare suggestion as to procedures; and this Court's rules, which provided certain procedures to be followed in obtaining limitation, and also resolved uncertainties in the Act itself in filling out the statutory "skeleton" provided by Congress. See *Black Diamond S. S. Corp.* v. *Stewart & Sons, Ltd.*, 336

* For the subsequent history of the venue provisions of Rule 54, see *infra*, pp. 57–58.

U. S. 385, 399–401. Neither source contained any suggestion that admiralty limitation was intended to preclude ordinary admiralty cross-claims procedures.

B. THE ALLOWANCE OF CROSS-CLAIMS BETWEEN CO-PARTIES HAS BEEN A CHARACTERISTIC FEATURE OF THE LIMITATION CONCOURSE SINCE ITS INCEPTION

The rules issued by this Court in 1872 marked the beginning of widespread use of admiralty limitation by shipowners. While they made no express provision for cross-claims by the limitation petitioner or other claimants arising from the maritime incident underlying the petition, the rules were not intended as exhaustive and the admiralty courts remained free, as in other forms of admiralty practice, to work out their own procedures within the framework of the law and the rules.

1. Following adoption of Rules 51–54 in 1872, this Court in a number of cases held that limitation could be had despite a shipowner's failure to follow the procedure established by the rules, since they were not intended to foreclose the use of other lawful procedures in the district courts. *The Scotland,* 105 U. S. 24; *Ex parte Slayton,* 105 U. S. 451. Cf. *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578. In *Ex parte Slayton, supra,* decided in 1881, the Court (per Waite, C. J.) held that a shipowner could file a limitation petition prior to any claim being filed against him, despite the express provisions to the contrary in Rules 54 and 57. The Court stated (p. 452):

> As was said at this term in *The Scotland* [105 U. S. 24], our rules were not intended to pre-

> vent an owner from availing himself of any other remedy or process which the law itself entitled him to adopt, but to aid him in bringing into concourse those having claims against him arising from the acts of the master or crew.

Thus, the absence of any provision in Rules 51–54 authorizing claims between parties to a limitation proceeding did not necessarily mean that such claims could not be heard by a district court following adoption of the rules, once the court had assumed jurisdiction over the *res*—the vessel or fund to be distributed. See also *infra*, pp. 36–40.

This conclusion is buttressed by two decisions of this Court in 1882 and 1887 recognizing that opposing parties in a cross-libel arising out of a marine collision could obtain the benefit of limitation *in the same proceeding* and that recovery could be had by the less damaged party up to the limit of his respondent's liability. Thus, *The North Star*, 106 U. S. 17, involved a libel *in rem* and cross-libel *in personam* arising from a collision. Both ships were found at fault, and a decree entered in favor of the libelant for the difference between his damages and half the aggregate damages of both parties. The libelant argued, for the first time in this Court, that he was entitled to limitation, and that he should be allowed to collect half his damages without offset for the damages of the cross-libelant, since his ship was totally lost. In holding that the parties were entitled to limitation after, but not before, offsetting damages where both were found at fault, this Court (through Mr. Justice Bradley) recognized that both parties could have

obtained the benefit of limitation *in the same proceeding* if both were entitled to it, and either party could recover against the other in the same proceeding without the necessity of a separate suit.[7]

Similarly in *The Manitoba,* 122 U. S. 97, both libelant and cross-libelant claimed and received the benefit of liability limitation, under the 1851 Act, in a collision libel in which both were found at fault; and the owner of the less damaged vessel was allowed recovery, limited to the value of the opposing owners' "interest" in their vessel and its pending freight. See also *The Scotland,* 105 U. S. 24, 33–36.

2. The early admiralty limitation procedure provided for cross-claims between parties not only in cross-libels but also in proceedings initiated by a shipowner. This is shown by a number of cases in the lower federal courts, particularly the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit. Decisions of those courts uniformly followed a flexible procedure permitting the complete resolution of all claims arising from a single maritime collision.

At a very early date, in 1873, immediately following this Court's decision in *Norwich* v. *Wright, supra,* Judge Benedict was confronted with the question

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[7] The cross-libelant was denied limitation because its fault lay in the original construction of the vessel, to which it was, of course, privy. 106 U. S. at 29. *The North Star* was not a proceeding initiated by an independent petition for limitation. It illustrates, however, the lack of historical basis for the notion that limitation is necessarily "sui generis" or "defensive" in character, or that one can never obtain the benefit of limitation and recover against a claimant in the same proceeding.

whether non-maritime claims could be heard in limitation proceedings, and whether in view of the procedural gaps in what is now R. S. 4284, an owner could limit his liability for injury and loss of life. *The Epsilon*, 6 Ben. 378, 8 Fed. Cas. 744, No. 4,506. In holding that all claims "arising out of the same disaster" were cognizable in limitation proceedings, Judge Benedict stated (*id.* at 381, 8 Fed. Cas. at 745):

> In a cause of this character the adjudication of any one demand involves an adjudication of all other demands made and arising out of the same disaster; and from the necessity of the case, therefore, the whole mass of demands may be brought within the cognizance of the Admiralty by the institution there of a cause of limitation of liability promoted by the ship's owner. * * *

Rejecting the contention that the court was powerless to grant limitation for certain claims because no procedure was provided by the Act, the court said further (*id.* at 389, 8 Fed. Cas. at 748):

> For the Admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the Admiralty. "The principles, rules and usages which belong to Courts of Admiralty" (Process Act 1792) enable these Courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other Courts, and for many of which it were vain to look in any statute.

> Stripped of the power to pursue these methods, there would be little left to distinguish a Court of Admiralty from a Court of equity or of law.
> * * *

Again in 1892, Judge Addison Brown in *The H. F. Dimock,* 52 Fed. 598, 599 (S. D. N. Y.), outlined the various methods by which a shipowner might then obtain limitation of his liability in a marine accident: (1) by answer, when sued; (2) by a petition offering to transfer the ship to a trustee; (3) by a similar petition under Rule 51 offering a stipulation to pay the ship's value into court; or (4) as a result of a creditor's (claimant's) suit for an apportionment and *pro rata* distribution. The third edition of Benedict's *Treatise on the Admiralty,*[8] issued two years later in 1894, contained for the first time a detailed treatment of the limitation proceeding, in the preparation of which the author acknowledged the "valuable suggestions" of Judge Addison Brown. Stating (*id.* at 315) that the limitation proceeding "should be considered as being both *in rem* and *in personam,* having therefore the advantages and the forms of both classes of proceeding," the treatise continued (*id.* at 316):

> Section 4285, which provides that the transfer by the owner of his interest in the vessel and freight to a trustee shall be "a sufficient compliance with the requirements" of the statute, points out one "appropriate" proceeding. But this is not the only one. For the rules of

[8] The various editions of this treatise are cited hereafter as Benedict (— ed.) p. —.

the Supreme Court provide for other proceedings. And it may be questioned whether these rules are exclusive; for, as the Supreme Court has itself said, the rules "were intended to *facilitate* the proceedings of the owners of vessels." If at any time it should appear that some proceeding not therein provided for was in any case more appropriate for securing the result, it can hardly be doubted that such a proceeding would be sustained, and as to all details of proceeding not specifically provided for in the rules this matter of their appropriateness for the purpose furnishes a criterion.

3. To our knowledge, the first reported decision applying these often reiterated principles to allow cross-claims in a limitation proceeding initiated by the shipowner is *The City of Boston,* 182 Fed. 171 (D. Mass.), decided in 1909. In that case, following a scow and ferry boat collision, both owners brought separate petitions for limitation of liability. The scow was found solely at fault in the ferry boat's proceeding (159 Fed. 257). Prior to an appeal from this finding, passenger claimants filed claims in the ferry boat's limitation proceeding (but not in the scow's), and the ferry boat's owner then appeared as a claimant in the scow's proceedings, seeking, *inter alia,* contribution for the passenger claims should both be found at fault (the scow's owner did not, however, claim in the ferry boat's proceeding). Both vessels were found at fault on appeal (162 Fed. 860), and, after the remand, the ferry boat owner sought consolidation of the two proceedings, or to implead the scow's

owner in its own proceeding to answer for one half its liability to the passengers. Judge Dodge denied the motion for consolidation, but granted impleader and allowed the cross-claim (182 Fed. 171, 173). While recognizing that the situation was not expressly covered by rule, the District Court held that "following the analogy of admiralty rule 59 [Rule 56], the [ferry boat owner] should be allowed, under the circumstances above referred to, to summon the [scow owner] to appear, answer, and defend against the claims of [the passengers] and to make them [the scow owner] parties to these proceedings for that purpose." (182 Fed. at 173.) The owner of the ferry boat, or the passengers, were allowed to recover by a cross-claim in the limitation proceeding "the same claim for contribution which it might recover in an independent suit" despite the absence of any "reported precedent for the allowance of such a claim in limited liability proceedings." *In re Eastern Dredging Co.*, 182 Fed. 179, 183 (D. Mass.). The decision is based on the principle that limitation claimants and petitioners can claim *inter se* in a single proceeding where necessary to a complete adjudication of the rights and liabilities of all parties to the proceeding, although it also allows impleader of a stranger to the proceeding—an issue not directly involved here (see *infra*, pp. 30–33).

The *City of Boston* was followed in due course by *The Adah*, 258 Fed. 377, decided by the Second Circuit in 1919 and relied on by the court below. Jacobus had contracted with Beer for the use of a chartered scow, the *Adah*, to lighter cargo owned by Beer on

the steamship *Uller*. Beer obtained a stevedore, Brady, to do the unloading. During the course of the work, the scow capsized, dumping the cargo and injuring herself and the *Uller*. When Fox, the scow's owner, was impleaded in a libel filed by the *Uller's* owners against Brady, the stevedore, he petitioned for limitation. All of the above persons filed as claimants in the concourse. The District Court absolved the scow and its principals; found the stevedore negligent, and Beer, the stevedore's employer and a claimant in the proceeding, liable for loss of the cargo and damage to the *Uller;* but did not make any decree as to the *Adah's* damage or award a money recovery. On appeal, Brady assigned as error the affirmative holding that he was negligent in the *Adah's* limitation proceeding, contending that the court had no jurisdiction in such a proceeding to do no more than absolve the *Adah* of blame. In rejecting this contention, Judge Hough stated (258 Fed. at 381):

> Whether it was necessary, in absolving the *Adah,* to fix blame on someone else, is a question we need not decide. Nor are we concerned with the inquiry whether the court could have compelled some of the parties to this appeal to come into the limitation proceedings. It is enough that they did come in, and made parties of themselves. Some of them (perhaps) came in voluntarily, but (as hereinbefore shown) all deliberately raised issues with each other, as well as with the petitioner, Fox, and litigated those issues at great length.
>
> Having become parties, they are bound by the decree entered in the suit wherein they are parties.

"Parties in the larger legal sense are all persons having a right to control the proceeding, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies."

All the persons, firms, and corporations before this court in this matter fully respond to this definition. How or why they became parties is immaterial; they have had their day in court, and their relative rights have in substance been properly adjudicated.

The decree appealed from is affirmed. * * *

Judge Hough's language strongly suggests, if it does not actually hold, that the District Court had jurisdiction not only to enter a decree finally determining the liability *inter se* of all parties to the proceeding, but also to award damages,

In the course of the extended litigation arising from a collision of the *S. S. Steel Inventor* with the destroyer *USS Woolsey* in 1921, the Second Circuit was again presented with, and this time squarely decided, the propriety of cross-claims in limitation. The *Inventor's* owners had instituted a proceeding for limitation in which the United States claimed and answered. The petitioner then filed a cross libel against the United States in the same proceeding for damage to its vessel, which was dismissed for want of jurisdiction. *Steel Inventor,* 1925 AMC 226 (S. D. N. Y.). Both vessels were found at fault, and as the United States' losses were much greater, it stood to receive a substantial payment from the limitation petitioner. Before the award, however, cargo damage claimants attempted to intervene and cross-claim

against the United States. The District Court dismissed the intervention petitions as an unconsented suit against the United States. When the cargo claimants appealed from this order, the Second Circuit reversed. It held that the United States' claim in limitation amounted to "a right of suit in admiralty against the Steel Inventor", subjecting the United States to cross-suit under principles enunciated in *The Thekla,* 266 U. S. 328. The award to the United States was regarded as a substitute for the lost *Woolsey* and a part of the *res* before the court which was subject to the lien of the cargo claimants. The court accordingly held that the claimants were entitled to recover against the United States, a co-claimant in the *Inventor's* limitation proceeding. *In re United States Steel Products Co.,* 24 F. 2d 657. On a second appeal from the final decree, the Second Circuit found that the *Woolsey* was solely at fault. It also overruled the District Court's order dismissing the *Inventor's* cross-libel[9] and allowed the *Inventor* (the limitation petitioner) to recover against the United States which was a claimant in its limitation proceeding, citing the *Steel Products* decision as authority. *The Steel Inventor,* 43 F. 2d 958, certiorari denied, 283 U. S. 819. These decisions stand squarely for the principle that both a limitation petitioner and a limitation claimant can file cross-claims in the limitation proceedings.

[9] Petitioner's brief does not point out that the District Court's ruling disallowing a limitation petitioner's cross-claim in *Steel Inventor,* 1925 AMC 226, was reversed by the Second Circuit. See *infra,* pp. 26–27.

See, for the same holding, *The Clio-The Springhill*, 1948 AMC 75 (S. D. N. Y.).

The Second Circuit has recently reaffirmed its holdings in the *Adah* and *Steel Inventor* by allowing a shipowner to cross-claim against claimants in its own limitation proceeding for indemnity for amounts it might be forced to pay to other claimants in the proceeding. *Moore-McCormack Lines, Inc.* v. *McMahon*, 235 F. 2d 142 (C. A. 2). The court cited its prior decisions as "direct authority" for the practice, and also cited, as "persuasive," the decision of the court below. It also stated that "in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids" (235 F. 2d at 143).[10]

The *Steel Inventor* proceedings display, in microcosm, the flexible and efficient cross-claim procedure developed by the Second Circuit and the district courts of that circuit in admiralty limitation. In such

[10] Petitioner suggests obliquely (Br. 36) that *McMahon* may be distinguishable since there are equitable considerations favoring counterclaims by the limitation petitioner which are not present in the case of a claimant's cross-claim, citing *The Thekla*, 266 U. S. 328. The distinction, we believe, is insubstantial. A claimant enters a limitation proceeding seeking recovery in competition with other claimants. To the extent that he does recover, other claimants' shares are reduced *pro rata*. Petitioner would allow him recovery without being subject to claims by other claimants arising from the same occurrence—claims which would otherwise reduce his share. However, claimants should no more be permitted to recover in limitation proceedings without being subject to offset by other claimants, than they should be allowed recovery without offset by the petitioner. If the *Thekla* rationale is applicable to one, it is applicable to both types of claim.

proceedings, the rights and liabilities of the various claimants are tried and settled in a single forum. Where appropriate, individual claimants are allowed to recover against other claimants for damage caused in the underlying incident. If the petitioner is entitled to offset or to affirmative recovery against a claimant, he can have it without the necessity of a separate suit in which the findings in the limitation proceeding would in any event be *res judicata*. The wisdom or practicality of this procedure will be considered in detail *infra*, pp. 40–63.

3. Despite these decisions, petitioner argues (Br. 31–35), relying primarily on scattered *dicta* in the Second Circuit and the Southern District of New York, that cross-claims have never been allowed in limitation. However, with the exception of a single district court ruling (*New Jersey Barging Corp.* v. *T. A. D. Jones & Co.*, 135 F. Supp. 97 (S. D. N. Y.))[11]—a ruling which in effect was subsequently overruled in the Second Circuit's *Moore-McCormack* decision (*supra*, p. 25)—none of petitioner's cases is authority for the proposition for which they are cited. We have already seen (*supra*, p. 24) that Judge Hough's order dismissing a cross-libel in *Steel Inventor*, 1925 AMC 226, which petitioner particularly emphasizes (Br. 35–36), was reversed by the Second Circuit in its review of the final decree in that proceeding (43 F. 2d 958).[12]

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[11] See note 14, *infra*.

[12] Judge Hough's order there should be compared with his views, speaking for a unanimous court, six years earlier in *The Adah*,

Petition of Texas Co., 81 F. Supp. 758 (S. D. N. Y.), also relied on by petitioner (Br. 33), actually supports our position. That case involved a collision between a fishing vessel and a tug owned by the Texas Company which brought a limitation proceeding in which the fisherman claimed but did not answer. Texas moved to "implead" the fisherman under Rule 56 to indemnify it against any recovery by passenger claimants. The District Court, by Judge Leibell, ordered the fisherman to answer the petition, since his claim put in issue the fault of both vessels; and held that, in the event both were found at fault, Texas would be entitled to set off one-half of its liability to the passengers against the fisherman's claim. This result is directly contrary to petitioner's assertion that no offsetting claim can be filed by a limitation petitioner.

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258 Fed. 377 (see *supra*, pp. 21–23). In *Steel Inventor*, Judge Hough cites no authority to support his view that cross-claims could not be had in limitation proceedings. His opinion does reflect a reluctance to allow cross-claims in the absence of a square appellate holding validating such a procedure, a holding which was to be supplied later in that very proceeding (*supra*, p. 24). We submit that Judge Hough's reasoning is unpersuasive, for in denying the cross-claim he relies (1) on the formal distinction between cross-libels and limitation proceedings, and (2) on the fact that, while cross-libelants must give security as respondents to the original libel, the stipulation or bond of a limitation petitioner is not security in this sense. The first point begs the question. As to the second, the stipulation will be adequate if limitation is allowed since it then constitutes the petitioner's maximum liability; and if limitation is denied, the security given by the petitioner can always be increased as a condition to allowing its cross-claim. See *infra*, p. 63.

Although the District Court in *Petition of Texas Co.* did not reach the question whether the petitioner could have obtained an *affirmative* recovery against the fisherman (see 81 F. Supp. 762), it nevertheless added in *dictum* that it would "seem" no recovery could be allowed, on the authority of *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (C. A. 2). That case, however, contains no such holding.

In *Algoma*, following a marine collision, one owner petitioned for limitation in the Western District of New York and the other, a railroad, brought a libel *in personam* in the Northern District of Ohio and also sought to file a limitation petition in the Western District of New York. The Court of Appeals, through Judge Learned Hand, held that venue was improperly laid in the latter district under this Court's then Rule 54, since (1) the railroad's vessel had been totally lost and hence neither it nor its proceeds were within the district, and (2) the railroad had not been sued in that district. See *supra*, p. 14.

The court also pointed out that the proceeding was an ordinary concourse in which no counterclaim had been filed, stating (86 F. 2d at 710):

> * * * Suppose the petitioner were to interpose a counterclaim to a claimant's claim; that that counterclaim were for a greater amount; and that the petitioner wished to use it, not only as a set-off, but as the basis for an affirmative recovery against the claimant. If this were permissible in the limitation suit, it would pro

> tanto become an offensive suit. We can assume arguendo, that it would be permissible, because the Great Lakes Company has not filed such a counterclaim. * * *

The court concluded that in the proceeding before it (*i. e.*, in the absence of a counterclaim) the original petitioner could not have recovered anything affirmatively. Hence, no "suit" had been filed against the claimant, despite the fact that the decree would be *res judicata* as to both the petitioner's and the claimants' fault (86 F. 2d at 710).[13] No other reading of the somewhat ambiguous decision appears tenable if Judge Hand's language is viewed in the context of the whole opinion as well as the result reached. This was Judge Knox's view of the opinion in *The Clio-The Springhill,* 1948 AMC 75, 77 (S. D. N. Y.). Further, Judge Hand had participated in the *Steel Products* and *Steel Inventor* decisions (*supra,* p. 24), and it is unlikely that he would have discredited those holdings *sub silentio. Algoma,* therefore, has no bearing on the question of whether cross-claims should be allowed.[14]

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[13] Under the present Rule 54, venue could have been laid in the Western District. See *infra*, p. 58.

[14] Circuit Judge Lumbard, sitting in the Southern District, had held prior to the Second Circuit's recent *Moore-McCormack* decision (*supra*, p. 25) that a limitation petitioner could not cross-claim against a claimant, who had not answered the petition, for indemnity against other claims, since a limitation proceeding was not a "suit," but a "special statutory proceeding" and a "defensive" action. *New Jersey Barging Corp.* v. *T. A. D. Jones & Co.*, 135 F. Supp. 97. The court relied on *Petition of Texas* and *Algoma*, *supra*, and the Fifth Circuit's decision in *Department of Highways of State of Louisiana* v. *Jahncke Service Corp.*, 174

C. THE DECISION OF THE FIFTH CIRCUIT IN *DEPARTMENT OF HIGHWAYS OF LOUISIANA* V. *JAHNCKE*, WHICH DEALS WITH THE QUESTION OF IMPLEADING A THIRD PARTY ON A DISTINCTLY SEPARATE CLAIM, HAS LITTLE OR NO BEARING ON THE PRESENT ISSUE

Petitioner argues that the Fifth Circuit's decision in *Department of Highways of State of Louisiana* v. *Jahncke Service Corp.*, 174 F. 2d 894, supports its position that related cross-claims are not allowable in admiralty limitation. But the facts in that case, clearly set forth in the record and the briefs of the parties made available to the court below, demonstrate that it has no real bearing on the present question.

In *Jahncke*, a number of barges, including one owned by the appellee Jahncke, tore loose in a wind storm and struck and injured the appellant Highway Department's bridge. When Jahncke petitioned for limitation in the Eastern District of Louisiana, the Department filed a claim and answer, and then filed a so-called "third party" petition seeking to implead the Town of Madisonville, the owner of several of the other barges which had struck its bridge. Since the barges (Jahncke's barge, on the one hand, and the

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F. 2d 894. We have shown that neither *Texas* nor *Algoma* support this proposition, and the *Jahncke* decision (discussed *infra*, pp. 30–33) relates to a different question, the right of a limitation petitioner to a true impleader, the bringing in of an outsider to the limitation proceeding to answer to a separate claim.

Poling Bros. No. 5-Tom Wogan, 1937 AMC 1513, also relied on by petitioner, held only that a collision limitation petitioner could not implead a third party to answer over when both vessels were found at fault, where the impleading claim did not arise from the subject matter of the proceeding and would have required resolution of entirely unrelated issues. The holding, if anything, supports our view, for it suggests by negative inference that impleader could be had on a claim arising from the subject matter of the proceeding.

Town's, on the other) were independently moored and owned, there was no connection between the accident involving Jahncke's barge and the accident involving the Town's barges, other than the coincidence in time, and hence no legal relation between the petitioner Jahncke and the Town.[15] The Highway Department thus was attempting to implead and recover against one *not a party on a claim which was distinctly separate* from the claims involved in the limitation proceeding.

In holding that impleader could not be had in these circumstances, the Fifth Circuit relied primarily on the "origin, nature and purpose of a limitation of liability proceeding" and the character of third-party practice under Rule 56, as those subjects are rather cursorily dealt with in the Sixth Edition of Benedict (174 F. 2d at 895, fns. 1, 2). See *infra,* pp. 36–40. It concluded that the *City of Boston,* 182 Fed. 171 (D. Mass.), *supra,* was distinguishable on its facts, presumably because there the claim on which impleader was sought arose out of the subject matter of the limitation proceeding. It is at least debatable whether a claimant in limitation should be allowed to implead a third party to answer *for a separate claim,* and it may well be that *Jahncke* was correctly decided on its facts which raised that precise problem.

If, however, the Fifth Circuit's rather generalized opinion can be read to prohibit impleader on claims arising from the very subject matter of the limitation

[15] For example, even if the Town had been impleaded, the court's findings as to the Jahncke-Department dispute would not, and could not, be binding as to the Department-Town dispute.

proceeding, we submit that it should be restricted to its actual facts, since there is no reason why a third party, properly served, should not be brought into a limitation proceeding to answer to claims arising in that proceeding. The impleaded party must necessarily be subject to suit in the district in which the limitation proceeding is being heard, and it is difficult to see how he would be prejudiced by being brought into such a proceeding, any more than in the case of an ordinary libel.

In any event, the *Jahncke* decision—whether rightly or wrongly decided—far from conflicting with the decision below, has no real relevance here. For, as we shall show *infra*, pp. 44–52, it does not follow, merely because third parties cannot be brought into a limitation proceeding, that claimants *already in that proceeding* may not obtain full disposition of their mutual claims and liabilities. A party seeking to recover in a limitation proceeding is obviously in a very different position from a stranger to the proceeding, who has been served with an impleading petition. The equitable and practical considerations dictating that a party seeking recovery should be subject to offsetting claims are absent in the case of a stranger to the proceeding. Although we believe that a third party should in fact be subject to impleader on a claim arising out of the limitation proceeding,[16] the answer to

[16] The Fifth Circuit, as we have pointed out, did not decide this question, but decided rather that no impleader could be had on a distinctly separate claim. Its failure to cite or consider the related Second Circuit precedents on cross-claims is understand-

that question is clearly not decisive on the quite different question of whether cross-claims are permissible between persons already parties.

D. NO CHANGE WAS MADE IN THE ESSENTIAL CHARACTER OF THE LIMITATION PROCEEDING BY THE 1936 AMENDMENTS TO THE LIMITATION OF LIABILITY ACT OR BY THE 1948 AMENDMENTS TO THIS COURT'S ADMIRALTY RULES

We have shown that the admiralty limitation proceeding has never been entirely a defensive action, but rather (like the receivership and bankruptcy proceedings discussed *infra*, pp. 46–52) has frequently provided both a concourse in which all claims against a particular party or fund could be marshalled and, when necessary, a forum for the final disposition of all claims arising from the maritime occurrence which is the subject matter of the proceeding. In furtherance of both these ends, courts of admiralty have generally preserved the traditional flexibility of admiralty procedure in limitation proceedings by allowing cross-libels by the petitioner and cross-claims between claimants where necessary to finally determine the rights of all parties. This has been, and remains, the rule in the Second Circuit, the admiralty court which with this Court has played a decisive, if not an exclusive, role in the development of limitation procedures during the last 50 years.

We have also seen that the original statute and rules did not preclude cross-claims. Neither the 1936 amendments to the Limitation Act nor this

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able in view of the facts before it. Moreover, those cases are not referred to in the sections of the Sixth Edition of Benedict on which the Fifth Circuit apparently relied.

Court's amendments to Rules 51–54 in 1948 changed in any way the basic character of the limitation proceeding, and more particularly the right to cross-claim in that proceeding.

1. The 1936 amendments (49 Stat. 1479) to the Limitation of Liability Act (R. S. 4283–4285, 46 U. S. C. 183–185) made only two significant changes in the Act's provisions.[17] R. S. 4283, providing the substantive right to limitation of liability, was amended by the addition of five subsections, the general effect of which is to increase the shipowner's liability for death or personal injury to a minimum of $60.00 per vessel ton. The original R. S. 4283 was retained as subsection (a). R. S. 4285, providing for a transfer of the owner's interest to a trustee, was amended to incorporate the substance of this Court's Rule 51, outlining certain procedures to be employed in petitioning for limitation. See H. Rep. 2517, 74th Cong., 2d Sess. on H. R. 9969, p. 6; Sen. Rep. 2061, 74th Cong., 2d Sess.; *The Chickie,* 141 F. 2d 80 (C A. 3); *Petition of Southern Steamship Co.,* 132 F. Supp. 316 (D. Del.). The amendment to R. S. 4285 also incorporated a six-month limitation on the right of the owner to file a limitation petition. R. S. 4284, authorizing apportionment of owner's interest, was unchanged. Thus, the only change in existing procedures made by the 1936 amendments was the six-month limit on the shipowner's right to bring an independent limitation

[17] The language of relevant portions of the Act prior to, and after, the 1936 amendments is set forth in parallel columns in the Appendix, *infra*, pp. 64–68.

proceeding.[18] It follows that, if cross-claims were permissible prior to the amendment, they were certainly so after it. See 3 Benedict (6th ed.) p. 347. These amendments, therefore, have no bearing on the right to cross-claim in admiralty limitation.

2. The 1948 amendments to this Court's Rules 51–54 (334 U. S. 864–869) were apparently the result of dissatisfaction with the notice and venue procedures of the prior rules. It has been stated that the amended rules were based in part on similar changes made in the rules of the District Court for the Southern District of New York. See *Petition of Canada SS. Lines, Ltd.*, 93 F. Supp. 549 (N. D. Ohio), *affirmed*, 185 F. 2d 1019 (C. A. 6).

The revisions in Rule 51 were largely matters of detail, clarifying or expanding existing procedures. Rule 54 was also amended to broaden venue in limitations proceedings brought by the shipowner. See *infra*, pp. 57–58. As is readily apparent from the text of the new rules, however, none of these changes altered in any way the basic character of the limitation proceeding, or has any bearing on the availability of cross-claims.[19]

[18] The six-month limit probably applies only to the affirmative petition by the shipowner, not to the owner's right to raise the limitation in an answer or other defensive pleadings, pursuant to R. S. 4284. *The Chickie*, 141 F. 2d 80 (C. A. 3). See *infra*, pp. 55–56. Presumably the doctrine of laches would still restrict reliance on the Act in defensive pleadings. See, *e. g.*, *United States Gypsum Co.* v. *Conners Marine Co.*, 33 F. Supp. 59 (S. D. N. Y.); *General Seafoods Corp.* v. *J. S. Packard Dredging Co.*, 40 F. Supp. 1015 (D. Mass.).

[19] A parallel text of pertinent parts of Rules 51 and 54 before and after amendment is set forth in the Appendix, *infra*, pp. 68–72. Rules 52 and 53 were not changed significantly.

In summary, we have shown, up to this point, that admiralty limitation has been a highly flexible procedure, offering all parties the benefits not only of a concourse of claims but also, where appropriate, the advantage of the cross-libel in which all claims arising from a single event can be adjudicated. The principle that cross-claims can be filed in limitation has been recognized in the Second Circuit for over 45 years, although, until recently, the practice had not been firmly established.

E. RULE 56 OF THE ADMIRALTY RULES IS BROAD ENOUGH TO PERMIT THE FILING OF CROSS-CLAIMS IN LIMITATION PROCEEDINGS

Petitioner argues (Br. 14–22) that, even if it would be desirable or otherwise appropriate to allow cross-claims in limitation, Rule 56 (governing general admiralty impleader) does not expressly allow them, and that rule is controlling in this proceeding. Rule 56, however, has been held broad enough to encompass cross-claims between co-parties in the ordinary admiralty libel, and is similarly broad enough to allow cross-claims in admiralty limitations. Furthermore, admiralty courts may adopt a cross-claim procedure without the express sanction of a rule of this Court.

1. It is true that in its inception Rule 56 was intended to apply only to the impleader of parties in cross-libels on marine collisions. As petitioner points out (Br. 14), the rule, as first promulgated, codified a decision by Judge Addison Brown allowing such impleader in *The Hudson,* 15 Fed. 162 (S. D. N. Y.), a collision case. Despite the fact that the rule by its terms was limited to collisions, Judge Brown had no

hesitancy in extending it by "analogy" to a cargo damage case (*The Alert,* 40 Fed. 836 (S. D. N. Y.)); from there, it was extended to any libel *in rem* or *in personam.*[20] Approximately 35 years later, this Court took advantage of the 1920 revision of its rules to codify this long standing expansion in the coverage of the rule.

Much of admiralty procedure has been built up "by analogy" to one or more of this Court's rules, although, as we will see, the drawing of such an "analogy" is not a prerequisite to the adoption of a district court admiralty rule. Interrogatories between cross-claimants are allowed by analogy to Rule 56 (*The Cleona,* 37 F. 2d 599 (S. D. N. Y.)); there is no joinder provision comparable to F. R. C. P. 20 (a), yet joinder is permitted in admiralty (2 Benedict (6th ed.) § 246; see also *id.,* § 228); actions are consolidated to facilitate disposition of all claims arising from a single transaction, but there is no rule comparable to F. R. C. P. 42 (a) (*id.,* § 354). Further examples from the reports and the district court rules could easily be multiplied. See, *e. g.,* the additional instances cited in *Dowling* v. *Isthmian S. S. Corp.,* 184 F. 2d 758, 777, 778, fn. 61 (C. A. 3); and notes to the Uniform Admiralty Rules adopted by the Southern and Eastern Districts of New York. 5 Benedict (6th ed.) 1956 Supp. pp. 13–25.

What is most significant here is that Rule 56 itself has been cited as the basis for the long established

[20] A detailed discussion of the history of Rule 56 and admiralty impleader can be found in Volume 3 of Moore's *Federal Practice* (2d ed.), pp. 450–456.

practice of allowing cross-claims between co-parties in libels *in rem* and *in personam*, although strictly speaking the rule is silent as to such claims. *O. Maire, Inc.* v. *The Yaka*, 79 F. Supp. 659 (S. D. N. Y.); *Lamborn & Co.* v. *Compania Maritima Del Nervion*, 19 F. 2d 155, 156 (S. D. N. Y.); *The Providence*, 293 Fed. 595 (D. R. I.).[21] We have also seen that in the first reported case dealing with impleader and cross-claims in limitation (*The City of Boston*, 182 Fed. 171 (D. Mass.); *In re Eastern Dredging Co.*, 182 Fed. 179 (D. Mass.)), Judge Dodge (182 Fed. at 173, 183) allowed both impleader and cross-claims "following the analogy of admiralty rule 59 [Rule 56]" (*supra*, p. 20).

2. The practice of expanding admiralty procedures by analogy to one or more of this Court's rules illustrate the truism that the general admiralty rules do not exhaust allowable admiralty procedures, and that both Congress and the Court have deliberately left the lower courts free, within the framework of the general rules, to develop their own procedures to meet

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[21] Sometimes, however, Rule 50 is relied upon, as it might have been in this case. See *The Lysefjord*, 263 Fed. 623 (S. D. N. Y.; *The Cleona*, 37 F. 2d 599 (S. D. N. Y.); *Moore-McCormack Lines, Inc.* v. *McMahon*, 235 F. 2d 142 (C. A. 2).

The leading case allowing cross-claims between co-parties by service on counsel is *The Eliza Lines*, 61 Fed. 308 (C. C. D. Mass.). The claims were allowed without reference to either Rule 50 or 56, the court stating (*id.* at 322):

"The rule on this point in admiralty must be even more liberal than in equity, as the former regards mere matters of form even less than the latter, and is even more disposed than the latter to adjudicate whatever rights come before it, when jurisdiction has once attached, so far as they can be justly adjudicated."

the particular needs of the admiralty in their jurisdiction. This is reflected not only by Rule 44 (stating that "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such manner as they deem most expedient * * *, not inconsistent with these rules,") but also by opinions of this Court expressly stating that its rules were not intended to exhaust the procedures employed in admiralty limitation (*Ex parte Slayton,* 105 U. S. 451, 452; *The Scotland,* 105 U. S. 24; *supra,* pp. 15–16), as well as by a multitude of cases in the lower admiralty courts.

American admiralty courts inherited from the civil law of England a body of procedural precedents of great elasticity, and an extremely flexible rule-making power. *Dowling* v. *Isthmian S. S. Corp.,* 184 F. 2d 758 (C. A. 3) certiorari denied, 340 U. S. 935. It was not until 1842 that this Court was given authority to promulgate general rules to create a desirable degree of uniformity in the essentials of admiralty practice. The power of the admiralty courts, however, to create their own practice within the framework of the general rules remained unaffected. *Dowling* v. *Isthmian S. S. Corp., supra; Boston Ins. Co.* v. *City of New York,* 130 F. 2d 156 (C. A. 2); *Welsh* v. *Erie R. Co.,* 39 F. 2d 869 (C. A. 6); *The Epsilon,* 6 Ben. 378, 8 Fed. Cas. 744, No. 4,506 (E. D. N. Y.); *The Hudson,* 15 Fed. 162 (S. D. N. Y.); *The Alert,* 40 Fed. 836 (S. D. N. Y.). Cf *E. J. Dupont de Nemours & Co.* v. *Vance,* 19 How. 162, 171–172; *Krauss Bros. Lumber Co.* v. *Dimon Steamship Corp.,* 290 U. S. 117, 124; *Archawski* v. *Hanioti,* 350 U. S. 532, 534.

Thus, the court below as well as the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon, supra,* p. 25, were following a long and distinguished tradition when they referred to the "analogy" of the general rules to support cross-claims in admiralty limitation, although such a reference was unnecessary in view of Rule 44 and long-existing practice. It follows that, while long precedent justified a reference to Rule 56 to support such claims, the court below was not prohibited merely by the absence of express authority in Rule 56 or other rules of this Court from allowing cross-claims between co-parties in limitation proceedings.

In what follows, we shall show that there is no warrant for retrogression to a more rigid practice at this stage in the development of admiralty procedure.

II

CROSS-CLAIMS IN LIMITATION PROCEEDINGS ARE NECESSARY TO ENSURE THE EFFECTIVENESS OF THE CONCOURSE, AS WELL AS TO PROTECT THE RIGHTS OF PARTIES GENERALLY

Thus far, we have sought to show that admiralty has pursued a liberal policy in allowing cross-claims in limitation and that the recent holdings of the court below and the Second Circuit merely reiterate a long, if not universally, established principle that such claims will be heard. Recognizing, however, that this Court, which is vested with plenary control over admiralty procedure (*Wilburn Boat Co.* v. *Fireman's*

Ins. Co., 348 U. S. 310, 314), confronts the question for the first time, we undertake to weigh the practical and procedural necessities that have led to the development of the rule adopted by the court below.

In general, it can be said that the considerations which led the Second Circuit and the district courts of that circuit to develop a liberal cross-claim procedure in admiralty limitation are equally, if not more, persuasive today. The necessities of admiralty practice offer a convincing argument for adoption of the same cross-claim practice in admiralty limitation which is available in the bankruptcy and receivership concourses, as well as civil and admiralty practice generally. No justification can be found for return to a more rigid procedure.

A. THE PURPOSE OF ADMIRALTY LIMITATION WILL BE FULLY SERVED ONLY IF CROSS-CLAIMS ARE PERMITTED

This Court, in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 215–218, has recognized two main advantages of the limitation proceeding: (1) to permit the shipowner, if found liable, to establish his eligibility for the liability limitation provided by federal law; and (2) to provide a forum where all persons interested in a collision or other marine accident can obtain a "settlement of the whole controversy over such losses as are comprehended within it" (*id.* at 215–216). Cf. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 415, 416.

Hartford Accident was a unanimous holding that an admiralty court retains jurisdiction over the parties to a limitation proceeding even after it has denied the petition both exoneration and limitation of liability. In the course of its opinion, this Court stated (*id.* at 216):

> The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy * * *.

After concluding that the statute must be given "a very broad and equitable construction for the purpose of carrying out its purpose" (*id.* at 215), the Court commented (*id.* at 217):

> If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute.
>
> Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief * * *.

Both the holding and the language of Chief Justice Taft's *Hartford Accident* opinion were reaffirmed by Chief Justice Hughes, speaking for the Court, in *Just* v. *Chambers,* 312 U. S. 383, 385–397, also a unanimous decision. These opinions recognize the close analogy of admiralty limitation to equity receiverships, and the desirability of having all claims disposed of in a single proceeding, where possible. See also *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413–423; *Black Diamond S. S. Corp.* v. *Stewart & Sons, Ltd.,* 336 U. S. 386, 399–401 (Mr. Justice Jackson dissenting); *In re Morrison,* 147 U. S. 14, 34.

This Court, therefore, has recognized that one of the chief values of admiralty limitation is to provide a forum in which all claims against the shipowner arising from a single maritime incident or accident can be resolved in a single proceeding. If the shipowner must bring an independent action to establish and collect on an offsetting claim, or if the claimant cannot obtain a final adjudication of his rights and liabilities in the limitation proceeding, the purpose of the action will be frustrated to that extent, and its utility thereby diminished. The claims of the owner or of other claimants, arising from the event or incident which is the subject of the limitation concourse, can and should be resolved in one proceeding, where the claimants are already before the court and the decree will be *res judicata* as to their respective rights. *Phelps* v. *McDonald,* 99 U. S. 298, 308.

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B. WHEREVER POSSIBLE, ALL CLAIMS ARISING FROM A SINGLE EVENT OR TRANSACTION SHOULD BE ADJUDICATED IN A SINGLE PROCEEDING

1. No dictate of modern pleading theory is more generally accepted than the desirability wherever possible of adjudicating all related claims in one proceeding. Clark, *Code Pleading* (2d ed.), §§ 60, 61, 64. This is the basic policy underlying Rules 13 and 14 of the Federal Rules of Civil Procedure. 3 Moore, *Federal Practice* (2d ed.), pp. 5–13, 407–414. Thus, for example, in a proceeding at law, a party having a counterclaim against a claimant arising out of the same subject matter of the original claim is not only permitted to assert its counterclaim in the proceeding but is generally *required* to do so or forfeit the counterclaim. Rule 13, *supra*. The practice of adjudicating all related claims in a single proceeding is so well settled that at first sight it is somewhat surprising to meet the argument that the admiralty concourse is different. Admiralty courts from time immemorial have led in the development of a flexible practice, adapted to the general conditions of maritime litigation, but capable of adjustment to the needs of special circumstances.[22]

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[22] See Woolsey, D. J., in *The Cleona*, 37 F. 2d 599, 600 (S. D. N. Y.):

"In the first place, it must be remembered that, fortunately, admiralty practice is plastic. It is largely judge-made, and consequently not technical—in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen. * * * Whilst the practice thus formed on precedent has from time to time been embodied in rules by the Supreme Court which have caused a wise procedure in one court to be made uni-

The classic libel proceeding *in rem* or *in personam* for many years has provided a forum in which all claims arising from a single event or marine accident can be finally adjudicated. A party entering such a proceeding voluntarily or by the route of admiralty impleader is subject to suit by service on his counsel by any other party on any claim related to the original claim which he brought, or on which he was joined. See *The Eliza Lines,* 61 Fed. 308, 324 (C. C. D. Mass.); *The City of Boston,* 182 Fed. 171 (D. Mass.); *Lamborn & Co.* v. *Compania Martinia Del Nervion,* 19 F. 2d 155 (S. D. N.-Y.); *The Cleona,* 37 F. 2d 599 (S. D. N. Y.); *Esso Standard Oil Co.* v. *United States,* 174 F. 2d 182 (C. A. 2); Rule 17, *Uniform Admiralty Rules* (E. and S. D. N. Y.), 5 Benedict (6th ed.) 1956 Supp., p. 19. Significantly enough, as noted in

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versal in the admiralty courts of the United States, there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules."

See also *The Epsilon*, 6 Ben. 378, 8 Fed. Cas. 744, No. 4506.

The origin of much modern federal civil procedure lies in admiralty. 3 Moore, *Federal Practice* (2d ed.), p. 405. It is probable that many characteristics of American admiralty practice can be traced to its development in district courts located in a small number of American seaport cities, in which there is a close knit bar of specialists, and where the truly maladroit lawyer or ingenuous shipowner is a relative rarity. In these conditions, which largely continue today, an extremely flexible practice is both possible and desirable. The special solicitude which the admiralty courts have always shown for seamen, who obviously form a special class lacking the resources and experience of ship operators, is a further example of the flexibility inherent in admiralty practice.

more detail, *supra,* pp. 37–39, this practice has never been embodied in a general rule, but is often permitted "by analogy" either to Rule 50 or to Rule 56 which do not specifically provide for it. *The Cleona,* 37 F. 2d 599 (S. D. N. Y.); *Lamborn & Co.* v. *Compania Martinia Del Nervion,* 19 F. 2d 155; *O. Maire, Inc.* v. *The Yaka,* 79 F. Supp. 659 (S. D. N. Y.). It is possible therefore for any party with a claim or interest in the subject matter of the libel to obtain a complete disposition of his rights and obligations in one proceeding without the necessity of ancillary suits. A separate suit must be brought only where a claim arises against a person (1) not a party to the libel and (2) not subject to impleader within the jurisdiction.

The limitation proceeding, in addition to its concourse feature, also serves the function of a cross-libel—namely, a determination of the respective rights and liabilities of the petitioner and the claimants. Thus, the presence of the concourse should logically make no difference in the parties' right to a final settlement of their obligations through the use of cross-claims "by analogy" to Rule 56. See *supra,* pp. 36–40.

2. In its dual function, the limitation proceeding is very like its closest procedural analogies, bankruptcy proceedings and equity receiverships, with one significant difference, to be discussed later. All three proceedings have the common purpose of facilitating the marshalling of the debtor's or petitioner's assets and the *pro rata* distribution of a limited fund to creditors.

In 1935, this Court was presented with the question whether an equity receiver could file a "compulsory" counterclaim (stemming from the same subject matter as the original claim) against a claimant in the receivership, in the absence of a statute or rule expressly allowing this. *Alexander* v. *Hillman,* 296 U. S. 222. While the receiver (the petitioner) argued "that by presenting their claims respondents submitted themselves to the jurisdiction of the court to grant affirmative relief * * *" (296 U. S. at 238), respondents relied primarily on the lack of any statute or rule establishing venue for a counterclaim. This Court held that "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance * * *" (*id.* at 241), and could be held to answer for any counterclaim arising from the subject matter of the proceeding (*id.* at 242), "in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. * * *" (citing *inter alia Hartford Accident Co.* v. *Southern Pacific,* 273 U. S. 207, 217–218). The Court reasoned that to require separate suits to determine rights directly related to these already at issue before the court (*id.* at 243) "would introduce additional elements of uncertainty and would involve unnecessary delay, work and expense."

Petitioner attempts to distinguish this holding on the ground that the fund before the court in a limitation proceeding is the petitioning owner's interest in

his vessel and her freight, and that cross-claims are unnecessary to establish or perfect this interest. But this is a distinction without a difference, since the true subject matter of a limitation proceeding (unlike the receivership) is not petitioner's interest in its vessel, but rather the marine disaster or incident which results in potential liability to the limitation petitioner and other parties. The sole subject of the receivership is the distribution of the estate, and the claimants are entitled only to recover their proportionate share of the estate. In a limitation proceeding, however, in which the liability of all parties must be determined, claimants have a legitimate interest in recovering against any parties found at fault in the proceedings, regardless of the existence or extent of the "fund" which limits the liability of the initial petitioner. This being the case, there is no more reason to require separate suits when someone other than the limitation petitioner is found at fault in admiralty limitations, than there is to require the equity receiver to sue separately to perfect the *res* which he is distributing. Thus, while the subject matter of the two proceedings differs—the first being the distribution of debtor's estate, and the second, a maritime occurrence giving rise to a variety of related liabilities and damage claims—the same considerations of convenience, certainty, and equity support the allowance of cross-claims in both.[23]

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[23] See also note 25, *infra*.

Petitioner's attempted distinction of *Hillman*, on the ground that counterclaims are necessary for complete distribution of the estate, but not of the limitation fund, overlooks the fact that a

The rule of the *Hillman* case has been adopted, after an initial uncertainty, in summary proceedings in bankruptcy where the trustee may file compulsory counterclaims against claimants in the summary proceeding.[24] Not only can the bankruptcy trustee counterclaim, but claimants in bankruptcy summary proceedings may obtain determination of their rights *inter se* respecting property within the court's jurisdiction, since they are held to have consented to such jurisdiction by filing their claims. *Collier on Bank-*

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situation analogous to the receivership is presented when both vessels are found at fault in limitation proceedings following a collision. In such a case, the petitioner is entitled to limit only after the damages to the two vessels have been offset. *The North Star*, 106 U. S. 17. If a claimant is entitled to recover one half the difference between his and petitioner's damage, his recovery should be treated as part of the *res* before the court, and other claimants should be able to reach this part of the "fund" by a cross-claim against the claimant. This is precisely what was allowed in *In re United States Steel Products Co.*, 24 F. 2d 657 (C. A. 2) (see *supra*, pp. 23–24).

[24] *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603 (C. A. 2), certiorari dismissed *sub nom. Silesian Holding Co.* v. *Union Bank*, 350 U. S. 978; *In re Solar Mfg. Corp.*, 200 F. 2d 327 (C. A. 3), certiorari denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940; *Florance* v. *Kresge*, 93 F. 2d 784 (C. A. 4); *Floro Realty & Inv. Co.* v. *Steem Elec. Corp.*, 128 F. 2d 338 (C. A. 8); *Bank of California Nat'l Ass'n* v. *McBride*, 132 F. 2d 769 (C. A. 9); *Inter-State Nat'l Bank of Kansas City* v. *Luther*, 221 F. 2d 382 (C. A. 10), certiorari dismissed, 350 U. S. 944.

The presently unsettled question as to whether a *permissive* counterclaim also can be brought by the trustee (cf. *Dwyer* v. *Franklin*, 227 F. 2d 152 (C. A. 7), certiorari denied, 350 U. S. 995) has no direct bearing on the issue of whether "compulsory" cross-claims (*i. e.*, those arising from the same subject matter as the initial claim) can be brought in limitation proceedings.

ruptcy (14th ed.) § 23.04.[25] Thus, in bankruptcy all claims between the trustee and rival claimants respecting the property which is the subject of the proceeding can be finally adjudicated without the necessity of supplemental plenary actions.

Under the decisions of the court below and the Second Circuit, admiralty limitation proceedings provide the same complete and final settlement of all liabilities arising from a single marine event, as do summary bankruptcy procedures in disposing of rights to the bankrupt's estate. Every consideration which can be cited to support the allowance of cross-claims in bankruptcy and receivership equally supports the rule adopted by the Second and Fourth Circuits. A determination as to rights to the debtor's property will be binding on all parties to the proceeding and the decree will be *res judicata* in any subsequent action, as the court below recognized (R.

[25] Petitioner (Br. 30) argues that the bankruptcy analogy is inapplicable or misleading because only cross-claims asserting rights to the debtor's property can be brought in bankruptcy, not all claims arising from transactions which in one or more respects involve the debtor's property. This would be more to the point if transactions of this type were the direct subject of the bankruptcy proceeding—which they clearly are not. There may be hundreds of transactions involved in a single bankruptcy affecting the debtor's assets in one or more respects, but which also raise a variety of other claims that would be both impractical and inequitable to try in the summary proceeding. In the limitation proceeding, in sharp contrast, only one transaction or event is involved—namely, the maritime accident or occurrence giving rise to damages. It is perfectly equitable and practical to try all the claims arising from this event in one proceeding; and this is why the real subject of the limitation proceeding is not the petitioner's "interest," but the underlying event.

85–86). Since the limitation petitioner's or the claimant's cross-claim must arise from the same subject matter as the claim or petition, the facts and legal issues governing the right to recover from a claimant are essentially the same facts and issues determining the claimant's rights against the petitioner. For this reason, the decree in limitation proceedings assessing blame or awarding exoneration will usually be *res judicata* of the petitioner's right to affirmative recovery. Similarly, rights of various claimants *inter se* on claims arising from the collision or other maritime subject matter of the proceeding must be first decided in order to determine relative rights of claimants in a *pro rata* distribution of the fund before the court; hence, the decree will usually be *res judicata* as to their mutual rights and liabilities.[26] Since the claimant is before the court, to

[26] We do not understand petitioner's (Br. 27) argument that a determination as to its fault might not be *res judicata* in a foreign forum, in contrast to the limitation petitioner's liability, which admittedly is finally determined by the limitation decree. A claimant will be found at fault in limitation only for acts arising from the collision or other subject matter of the proceeding. As in the case below, the admiralty court must necessarily assess the fault of all vessels involved in the proceeding, in order to determine the petitioner's liability, if only because of the admiralty rule providing for divided damages. See *The Adah*, 258 Fed. 377 (C. A. 2). Hence, a vessel-owner claimant necessarily submits itself to the court's jurisdiction for a determination of its own fault in seeking a determination of the petitioner's liability. For this reason, there can be no question that a foreign court, if it follows established principles, will give full effect to the findings of the limitation court. See Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L. J. 1087, 1135.

require the petitioner or a claimant to bring a separate proceeding in the same or another jurisdiction would be an empty formalism, completely out of keeping with the basic character of admiralty practice.[27] This conclusion is confirmed by often reiterated principles that admiralty procedures should be inherently more flexible than equity procedures, and that the admiralty must at least keep abreast of equity in the convenience of its practice. *The Eliza Lines*, 61 Fed. 308, 322 (C. C. D. Mass.); *Richmond* v. *New Bedford Copper Co.*, 20 Fed. Cas. 738, 739, No. 11800 (D. Mass.); *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758 (C. A. 3), certiorari denied, 340 U. S. 935.[28]

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[27] Petitioner (Br. 24–26) objects to the observation of the court below that claimants will be caused additional expense and inconvenience if they are not allowed to claim against petitioner in the Norfolk proceedings. What petitioner does not mention, however, but what the Fourth Circuit recognized (R. 85), is that the claimants would have to bring a second, independent action after termination of the Norfolk limitation proceedings in which petitioner's fault had been established; this proceeding would necessarily involve additional expense and inconvenience, as well as lapse of time.

[28] The courts, in the absence (outside the Second Circuit) of a definitive rule providing for cross-claims, heretofore have made liberal use of consolidation, or combining the hearing of two or more limitation proceedings or cross-libels, to obviate time-consuming, expensive, and functionally useless collection suits. 2 Benedict (6th ed.) § 354; *Southern Pacific Co.* v. *United States*, 72 F. 2d 212, 214, 215 (C. A. 2).

The consolidation expedient, however, is unnecessarily clumsy, and is not available whenever, as must frequently be the case, the related suits are not all pending in the same district. For this reason, the device of consolidation is not an adequate substitute for the right to cross-claim in limitation proceedings, any more than it would be in bankruptcy or receivership.

III

THE AVAILABILITY OF CROSS-CLAIMS WILL NOT REDUCE THE EFFECTIVENESS OR THE FAIRNESS OF THE ADMIRALTY CONCOURSE

Petitioner's argument reduces finally to its assertion that (Br. 37–43), assuming cross-claims have been or could be prosecuted in limitation proceedings, it is unwise to allow them because of prejudice to claimants or the danger that foreign claimants will be reluctant to enter the proceeding. While the latter danger cannot entirely be discounted, we believe that, in fairness and practicality, any claimant who seeks affirmative recovery should be subject to offsetting or affirmative claims arising from the same occurrence. In actuality, there is little danger that foreign limitation claimants will be substantially deterred from filing claims. Nor can it be said that claimants will be unfairly prejudiced by the availability of a cross-claim procedure.

A. A CLAIMANT WHO SEEKS TO PRESS HIS CLAIM SHOULD NOT, IN FAIRNESS, BE IMMUNE IN THE SAME PROCEEDING FROM OFFSETS OR AFFIRMATIVE RECOVERY ON THE SAME TRANSACTION

The inequities of petitioner's position are evident, as the court below recognized (R. 87–88). Under petitioner's view, it could have filed a claim in the proceedings before the District Court in Norfolk and collected from the United States, if the United States had been found at fault. But if both vessels were found at fault, the United States not only could not have an affirmative recovery, but in addition would not even be entitled to offset its own damages against petitioner's claim. Instead, under petitioner's view, the United

States would have to bring an entirely unnecessary secondary action in England against the petitioner, in which the Norfolk decree would be *res judicata* under generally accepted principles, merely to obtain an offset.[29]

The passenger claimants (or seaman claimants, if there were any)[30] would be put to the same useless expenditure of time and money by the rule sought by petitioner. In order to collect from the petitioner after claiming in the United States' limitation proceeding, the passengers, in the event (1) either the United States vessel was exonerated (as in this case) or (2) both were found to blame, would have to bring a separate action in England, assuming that they could recover at all under British law.

Finally, the result urged by petitioner is entirely premised on the fact that it was the United States which sought a *concursus* at Norfolk. Had petitioner libeled the United States or its vessel in the same court on the exact claim on which it sought to

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[29] Further, it is at least open to question whether petitioner is a legal entity subject to suit at all in its own courts, although it claims it is not the British Government, and hence is subject to suit in the courts of this country. The United States has been notified through official channels that petitioner's vessel is not regarded as a vessel of the British Government within the coverage of the wartime "Knock for Knock" Agreement between the United Kingdom and the United States, 56 Stat. 1780. The British courts have not to our knowledge passed on the question whether petitioner is subject to suit as a private corporate entity, and it is at least doubtful whether a suit on a maritime cause of action would lie against it. Compare *Tamlin* v. *Hannaford*, [1949] 2 All E. R. 327 (C. A.), with the adverse comment on this decision in 12 Mod. L. Rev. 496.

[30] Cf. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409.

recover here, it plainly would have been subject to cross-claims by any other party to the proceeding.

In the light of these considerations, we submit that only extreme danger to the limitation *concursus* or prejudice to its participants would justify the adoption of a rule which is so unfair and, at the same time (as we have shown), so contrary to every tenet of modern procedure and admiralty practice. It will be seen, however, that petitioner's forebodings of danger or prejudice are without substance.

B. A CLAIMANT IS NOT PREJUDICED BY BEING SUBJECTED TO OPPOSING CLAIMS IN ADMIRALTY LIMITATION

1. Petitioner argues (Br. 26) that limitation claimants will be prejudiced by being themselves denied the right to limit if they are subject to cross-claims in limitation. The argument is that a limitation claimant subject to a cross-claim might be barred from limiting his own liability by the six-month time limit provided by the 1936 amendments to R. S. 4285 (*supra*, p. 34).[31] In the first place, a claimant, if he

[31] Petitioner apparently has abandoned an argument, based on *Algoma Cent. & Hudson Bay Ry. Co.* v. *Great Lakes Transit* Corp., 86 F. 2d 708 (C. A. 2), which it pressed on this Court in seeking certiorari (Pet. 19), that a limitation claimant subject to an opposing claim may not be able to petition to limit his own liability in the same district. *Algoma*, a venue decision, held under this Court's Rule 54 that a claimant could not obtain venue in a district where he had not been sued, inasmuch as no cross-claim had been filed against him. Although the holding may have been unduly restrictive (cf. Judge Addison Brown's opinion, *In re Leonard*, 14 Fed. 53 (S. D. N. Y.)), the decision is in any event now outmoded inasmuch as Rule 54 was amended in 1948 (334 U. S. 869) to allow a limitation petition to be brought in any district

does not anticipate further claims and therefore does not need a *concursus,* probably can plead his right to limit (as a defense) at any time in the limitation proceeding. See *The H. F. Dimock,* 52 Fed. 598 (S. D. N. Y.), *supra*; *The Chickie,* 141 F. 2d 80 (C. A. 3).[32] If a claimant needs a concourse for his own protection, under Rule 54 and R. S. 4285 he is clearly entitled to file his own petition for limitation in the same district within six months after a cross-claim has been filed against him. Under the usual practice, this limitation proceeding would be consolidated with the original proceeding, and by this means all parties who desired it could obtain the benefit of both a *concursus* and a liberal cross-claim practice. 2 Benedict (6th Ed.) § 354.[33]

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court where the owner has not been sued and the vessel or its proceeds are not located in any district. Furthermore, if a cross-claim were filed against a claimant, he would be entitled to bring a limitation petition in the same district under Rule 54, even prior to the 1948 amendment. See *infra*, ff.

[32] The Third Circuit is the only circuit which has passed on this question, and as petitioner points out (Br. 26), there is a split in the district court holdings. The Third Circuit's decision, which was based on a detailed analysis of the history of the 1936 amendments, is, we submit, persuasive and states the correct view of the law.

[33] Petitioner points out that in this case it may be barred from obtaining limitation because it failed to petition for a limitation within six months of the cross-claims against it. In the first place, if the claims asserted against petitioner do not exceed its interest on its vessel and her freight, it can be fully protected by pleading limitation as a defense in the present proceeding, relying on *The Chickie*, 141 F. 2d 80 (C. A. 3), *supra*, which would no doubt be adopted by the Fourth Circuit. 3 Benedict (6th ed.), § 483. If petitioner needs a concourse, however, R. S. 4285 would appear to be a bar, unless the admiralty court relieved petitioner of the re-

2. It might be thought that foreign claimants will be put at a special disadvantage in having to submit to offsetting suits in exchange for a hearing of their claim against a limitation petitioner. If, in fact, this is a disadvantage, it is clearly justified by the strongest considerations of equity and fairness, as we have just pointed out (*supra*, pp. 53–55). Cf. *The Thekla*, 266 U. S. 328; *National City Bank* v. *Republic of China*, 348 U. S. 356. However, the foreign limitation claimants most frequently subject to offsetting claims are foreign shipowners which are usually doing business in and subject to suit in the United States, or whose vessels visit American ports.[34] It is a convenience rather than a burden to such claimants to have their liability determined in one proceeding, rather than in two or more separate suits, possibly in widely separated districts.

3. Petitioner also argues (Br. 18–19) that the flexible venue provisions of Rule 54, which allow a limitation petitioner, in effect, to pick his forum when no

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quirement of a timely petition—following *The Chickie's* holding that the substantive right to limit under R. S. 4283 (a) is not subject to the six-month time limit, and concluding that petitioner's failure was excusable in view of the alleged lack of a "settled" practice. Compare *Norwich Co.* v. *Wright*, 13 Wall. 104, 126. As to the propriety of such equitable relief, we express no opinion. In any event, whatever the equities of petitioner's position, its particular circumstances cannot be a decisive factor in the choice of a rule of procedure applicable to all limitation proceedings in the future.

[34] Petitioner, as an operator of ocean-going vessels, is atypical in this respect. Passengers and cargo shippers, the other two most prevalent types of limitation claimant, are not usually subject to opposing claims.

action has been brought against him, can work a hardship on potential claimants. As originally promulgated, Rule 54 allowed a petition to be filed only in a district where the owner had been sued or his vessel libeled. In 1889, Rule 54 was amended (130 U. S. 705) to permit, where no suit had been brought, a petition in the district where the vessel or its proceeds were located. The 1948 amendment (334 U. S. 869) allows a petition to be filed in any district, when none of the above is applicable. What petitioner does not mention is that this Court, in broadening the venue provisions in 1948, included a provision, comparable to 28 U. S. C. 1404, authorizing a district court in its discretion to transfer limitation proceedings to any district for the convenience of the parties. This provision obviously was intended to obviate possible prejudice to claimants resulting from an inconvenient forum. See Appendix, *infra*, p. 72.

C. CROSS-CLAIMS IN ADMIRALTY LIMITATION AFFORD AN ENTIRELY PRACTICAL PROCEDURE

Conversely, petitioner argues (Br. 36–39) that cross-claims are not practicable in admiralty limitations because foreign claimants would be discouraged from coming into American limitations proceedings if they anticipated claims against them, and that the concourse would be defeated because these claimants would be free to bring suit against the limitation petitioner elsewhere. It also points out that other maritime nations do not allow cross-claims in proceedings for limitation of liability. We submit that these factors, to the extent they pertain, are not de-

cisive, and certainly do not compel adandonment of the cross-claims procedure.

1. First, we have just pointed out that the foreign claimants most likely to be claimed against are usually subject to suit in the United States, and it is to their advantage, rather than otherwise, to have claims determined in the limitation proceeding. And since they are suable in the United States, they will usually have no choice but to enter the proceeding in order to protect their rights. Second, the major premise of petitioner's argument can be questioned. Although there is of course nothing which an American admiralty court can do to compel a foreign claimant, not a party, to respect its restraining order, as a matter of practice and comity foreign tribunals can be expected to give effect to such orders, as well as the final decrees in limitation proceedings. See *Algoma Cent. & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708, 710 (C. A. 2); Stumberg, *Conflict of Laws* (2d ed.), pp. 130–133; Beale, *Conflict of Laws*, p. 1399.[35]

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[35] Compare *Report to Maritime Law Association* concerning proposed International Convention on Limitation of Liability of Shipowners (Maritime Law Association Document No. 388, April 1955, p. 3839):

"* * * Most ship casualties which give rise to limitation proceedings have a locale which makes recourse of the owner to his national courts (occasionally others) not inconvenient or prejudicial to those persons and interests having claims to assert. No reason is seen by your Committee why that *concursus* of all claimants which is the sure and equitable basis of all genuine limitation proceedings, should not be had in whatever country the owner may now lawfully initiate his proceeding. Under present day quick communication and transport conditions there should be no

Bankruptcy decrees discharging a bankrupt's debts against all creditors with notice present exactly the same question. It is uncertain whether a foreign court would honor a decree in a suit on a discharged obligation by a creditor who, despite notice, had not claimed in the bankruptcy proceeding. See 8 *Remington on Bankruptcy* (6th ed.) § 3312. Yet this uncertainty has not prevented the courts from allowing the bankruptcy trustee to counterclaim against foreign claimants. See *supra,* pp. 49–50. The bankruptcy analogy is a convincing indication, we believe, that petitioner's caveat is overdrawn.

In final analysis, the uncertain extent to which foreign claimants may be discouraged from appearing in American limitation is outweighed by the manifest advantages of the cross-claim procedure, and the obvious inequity of allowing the foreign claimant to recover without offsetting his own liability.

2. Petitioner also points out (Br. 38–43) that the courts of other maritime nations do not permit cross-claims in proceedings for limitations of shipowners' liability. Petitioner does not make clear why this fact forces litigants in American courts to forego such procedures, nor does it supply a reason why American admiralty procedure—as distinct from substantive maritime law—must duplicate that of other nations. There is good reason, in any case, why cross-claims are not available in other jurisdictions, a reason which

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claimants everywhere, or about their due representation. Such final decree as might be reached by the adjudicating court ought to be regarded throughout the world as *res judicata*—which indeed

points to the adoption of such procedure here, rather than, as petitioner believes, to its rejection.

Briefly stated, the continental limitation proceeding, as petitioner points out (Br. 41), is a pure concourse of claims. Unlike the American proceeding, it is not concerned with the determination of anyone's liability. In the continental courts, as well as in England, liability has already been determined either by admission or in earlier proceedings prior to the concourse. Hence, neither the liability of the petitioner nor that of any claimant is at issue in such proceedings, and there is no occasion for hearing or allowing claims between the parties. The continental proceeding thus is solely concerned with the distribution of a sum of money to rival claimants. If, in fact, the American proceedings were so limited, petitioner could contend with greater justice that it would be inappropriate to inject further liability issues. But in the American admiralty court, which must determine liabilities of the various participants in the maritime occurrence *inter se* as well as distribute the owner's interest (when he is found liable), there is no good reason for not allowing cross-recoveries since substantive rights and liabilities are being determined in that very proceeding.

The sharp distinction between the two types of proceeding is illustrated by British practice. Britain follows the continental rule that a ship owner is entitled to limitation only after he admits at least partial liability for the maritime collision or other occurrence involved. Marsden, *Collisions at Sea* (10th [illegible] 201-202. Although a formal admission

of liability apparently need not be included in the limitation petition (*The Amalia,* 8 L. T. 805, 1 Moo. PCC (NS) 471), such an admission must be made prior to entry of the limitation decree, for the British admiralty will not try the question of the owner's liability in the limitation proceeding. *Hill* v. *Audus,* 24 L. J. ch. 229, 69 ER 456; and cases cited at 30 Halsbury, *Laws of England* (2d ed.), p. 945. In the British practice, as reflected in the cases, the limitation concourse is usually initiated by the shipowner following a collision libel in which the liability of all parties is determined. *C. A. Van Eijck and Zoon* [1906] L. R. (App.) 489 (House of Lords); Marsden, *supra,* at p. 203. The subsequent proceedings are concerned solely with ascertaining the extent of the owner's interest, his right to limitation, and the *pro rata* distribution of that interest. *Hill* v. *Audus, supra; Carron Company, Pet.,* 23 Scot. L. R. 81.[36]

Since, in contrast, the American proceeding combines in one action what is, in effect, a cross-libel and one or more proceedings for the distribution of an owner's interest,[37] there is every reason for making ordinary cross-claims practice available, if it is at all possible to do so.

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[36] The British limitation proceeding is treated as a pure *concursus*, equivalent to an English bankruptcy proceeding. *Carron Company, Pet., supra; Rankine* v. *Raschen & Co.*, 14 Scot. L. R. 476.

[37] In the typical collision case, more than one shipowner will file a limitation petition, and, if possible, the proceedings are usually consolidated.

3. Cross-claims present no procedural problems in limitation practice in other respects. We have seen that liberal cross-claims procedures are employed without apparent difficulties in the two closely analogous concourse proceedings, receivership and bankruptcy. *Supra,* pp. 46–52. In determining a foreign claimant's liabilities, conflicts of laws problems will seldom arise, since the same law governs the liability of all parties to a single marine incident. Goodrich, *Conflict of Laws* (3d ed.), § 92; *The Belgenland,* 114 U. S. 355. The admiralty requirement of stays or security presents little or no problem, for, as we have pointed out, the petitioner's stipulation constitutes his security and can be increased where necessary; and if called for, claimants can be required to post security in responding to cross-claims under Rule 50. Questions of procedural detail arising in particular limitation proceedings can be left to the discretion of the individual courts, as in the past, in accordance with admiralty practice.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

LIMITATION OF SHIPOWNER'S LIABILITY ACT

(9 Stat. 635, R. S. 4281–4286, as amended, 46 U. S. C. 181–186)

PRIOR TO 1936 AMENDMENTS

R. S. 4283 (46 U. S. C. 183):

Liability of owner not to exceed interest. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel,

SUBSEQUENT TO 1936 AMENDMENTS

R. S. 4283 (46 U. S. C. 183):

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or

PRIOR TO 1936 AMENDMENTS	SUBSEQUENT TO 1936 AMENDMENTS
R. S. 4283 (46 U. S. C. 183)—Continued	*R. S. 4283 (46 U. S. C. 183)*—Continued
and her freight then pending.	value of the interest of such owner in such vessel, and her freight when pending. [R. S. 4283 was amended in 1936 (49 Stat. 1479) by the addition of subsections (b)–(f) placing a restriction on the owner's right to limit his liability for loss of life and personal injury to a minimum of $60.00 per vessel ton.]
R. S. 4284 (46 U. S. 184):	Unchanged.
Apportionment of compensation. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from	

PRIOR TO 1936 AMENDMENTS	SUBSEQUENT TO 1936 AMENDMENTS
R. S. 4284 (46 U. S. 184)—Continued	
the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.	
R. S. 4285 (46 U. S. C. 185):	*R. S. 4285 (46 U. S. C. 185)*:
Transfer of interest of owner to trustee. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such	The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with

PRIOR TO 1936 AMENDMENTS	SUBSEQUENT TO 1936 AMENDMENTS
R. S. 4285 (46 U. S. C. 185)—Continued	*R. S. 4285 (46 U. S. C. 185)*—Continued
vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.	the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

PRESENT ADMIRALTY RULE 51 (ADOPTED JUNE 21, 1948. 334 U. S. 864. THE FULL TEXT OF THIS RULE IS SET FORTH IN PETITIONER'S APPENDIX, PP. 45–48)

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851 * * *, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. * * * With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of

FORMER ADMIRALTY RULE 51 (ADOPTED MARCH 7, 1921, AS AMENDED, 254 U. S. 25)

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, * * * and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851 * * * the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf;

PRESENT ADMIRALTY RULE 51, ETC.—continued

petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, * * *

Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, * * *

or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to

FORMER ADMIRALTY RULE 51, ETC.—continued

and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties * * * for the payment thereof into court * * * whenever the same shall be ordered;

or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by

PRESENT ADMIRALTY RULE 51, ETC.—continued	FORMER ADMIRALTY RULE 51, ETC.—continued
be appointed by the court under the fourth section of said Act. * * *	the court under the fourth section of said act;
Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, * * *.	and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages * * *.
* * * The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.	and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

PRESENT ADMIRALTY RULE 54

(ADOPTED JUNE 21, 1948, 334 U. S. 869)

Courts Having Cognizance of Limited Liability Procedure.—The said petition shall be filed and the said proceedings had in any District Court of the United States in which said vessel has been libeled to answer for any claim in respect to which the petitioner seeks to limit liability; or, if the said vessel has not been libeled, then in the District Court for any district in which the owner has been sued in respect to any claim. When the said vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner, the said proceedings may be had in the District Court of the district in which the said vessel may be, but if said vessel is not within any district and no suit has been com-

FORMER ADMIRALTY RULE 54 [RULE 57]

(ADOPTED MAY 6, 1872, 13 WALL. XIII–XIV)

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libelled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

PRESENT ADMIRALTY RULE 54—continued	FORMER ADMIRALTY RULE 54 [RULE 57]—con.
menced in any district, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules.	

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION,
Petitioner,

vs.

UNITED STATES OF AMERICA, as owner of the U. S. N. S. HAITI VICTORY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE INTERVENING CLAIMANTS

VANDEVENTER, BLACK & MEREDITH,
JETT, SYKES & HOWELL,
HUGHES, LITTLE & SEAWELL,
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BRIEF FOR THE INTERVENING CLAIMANTS

Opinions Below

The memorandum opinion of the District Court (R. 58) denying to the intervening claimants the right to implead the petitioner is not reported. The District Court opinion (R. 64-71) by which the United States, as owner of the HAITI VICTORY, was exonerated from liability for the collision is reported at 131 F. Supp. 712. The opinion of the Court of Appeals (R. 77-88) is reported at 230 F. 2d 139.

Jurisdiction

The decree of the United States Court of Appeals for the Fourth Circuit (R. 88-89) was entered February 13, 1956. Time for the filing of the petition for a writ of certiorari was extended to July 12, 1956, by order of the

Chief Justice dated April 10, 1956. The petition for a writ of certiorari was filed July 11, 1956. It was granted by order filed October 8, 1956 (R. 90), but limited to the single question stated below. Jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

Statutes and Rules Involved

The applicable provisions of the Limitation of Liability Act and of this Court's Admiralty Rules are reproduced at pages 44 to 50 of the appendix to the petitioner's brief.

Question Presented

The United States, owner of the HAITI VICTORY, which was in collision with the British Transport Commission ferry DUKE OF YORK, commenced limitation-of-liability proceedings in the United States District Court for the Eastern District of Virginia (R. 1). Thereafter a monition (R. 11) was issued against all persons claiming damages occasioned by the collision, pursuant to the provisions of Rule 51 of the Rules of Practice in Admiralty and Maritime Cases. The British Transport Commission filed its claim (R. 22-24) and its answer to the limitation petition (R. 24-28), that answer bringing to issue the matter of liability for the collision. Thereafter various death, personal injury and baggage claimants were granted leave (R. 34), subject to further order of the court, to file petitions impleading the British Transport Commission under the authority of Admiralty Rule 56, to respond to those claimants in damages for their losses resulting from the collision. The District Court thereafter disallowed the impleading petitions (R. 58-59).

In its order allowing certiorari (R. 90), this Court directed that review of the judgment of the Court of Appeals

for the Fourth Circuit would be limited to the first question presented by the petition:

> "The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision."

These claimants agree with the suggestion of the United States that the question stated presents the broad issue whether cross-claims under Admiralty Rule 56 are available generally in admiralty limitation and exoneration proceedings.

Statement

The claims asserted in this litigation result from a collision between the U.S.N.S. HAITI VICTORY and the Steamship DUKE OF YORK in the North Sea on May 6, 1953.

Following the collision the United States of America, as owner of the HAITI VICTORY, in due course, filed a petition for limitation of or exoneration from liability in the United States District Court for the Eastern District of Virginia, Norfolk Division.

Among the claimants who intervened and filed claims in this proceeding was the British Transport Commission, owner of the Steamship DUKE OF YORK, in which it asserted a substantial claim for the damage done to the DUKE OF YORK. Various other claims were filed, including those on behalf of passengers on the DUKE OF YORK who were injured and on behalf of the estates of passengers on the DUKE OF YORK who were killed as result of this collision and for loss of baggage and personal effects.

Subsequent thereto a number of these claimants filed petitions under the 56th Admiralty Rule impleading the co-claimant, British Transport Commission.

On July 2, 1954, the District Court by its unreported memorandum opinion denied the right of those claimants to so implead the British Transport Commission, and on May 12, 1955, an order was entered by the Court to this effect.

On June 2, 1955, the District Court entered its final decree exonerating the United States of America, as owner of the HAITI VICTORY, from any and all liability arising out of the collision.

The majority of the claimants, with the exception of British Transport Commission, excepted to and appealed from the decree of the District Court dated May 12, 1955, denying the right of the various claimants to implead the British Transport Commission.

On February 13, 1956 the Court of Appeals for the Fourth Circuit filed its decision affirming the decree of the District Court exonerating the United States as owner of the HAITI VICTORY from liability arising out of the collision, but reversing the Court with regard to its order denying the petitions of these various claimants to implead the British Transport Commission under the 56th Admiralty Rule to respond to those claimants for the damages suffered.

Petitions for writs of certiorari were filed by the individual claimants and by the British Transport Commission—by all with respect to the collision decree and by the Commission with respect to the reversal by the Court of Appeals of the order as to the impleading petitions. The petitions as to collision liability were denied; that with regard to the single question of impleader under Admiralty Rule 56 in the limitation proceeding, as stated above, was granted.

Summary of Argument

An admiralty court sits as a court of equity and, having once assumed jurisdiction over a limitation action, has power

to decree relief with respect to all parties before it. It may determine not only the rights that exist between the limitation petitioner and the several claimants but also the rights as among those claimants. From practical and equitable standpoints, it would work undue hardships on the intervening claimants herein if their rights against the British Transport Commission should not be determined in this proceeding.

Argument

From an examination of the authorities it appears that this is a case of first impression. While there have been various cases involving the right of a petitioner in a limitation-of-liability proceeding to implead a claimant, and the right of a claimant or a petitioner to bring in a third party, there have been no cases that we have been able to find that involve the precise issue here, to-wit: Whether one co-claimant in a limitation-of-liability proceeding can implead another co-claimant under the provisions of the 56th Admiralty Rule.

The limitation-of-liability proceeding is the administration of equity in an admiralty court. It looks to a complete and just disposition of all matters in dispute. Both equitable considerations and practical considerations lead to the conclusion that the right of a claimant to a limitation fund to implead under Rule 56 a co-claimant in a limitation proceeding should be permitted.

The admiralty court sits as a court of equity—a fact recognized by the Court of Appeals in its opinion, 230 F. 2d at 144. See *Morrison* v. *The District Court*, 147 U. S. 14; *Hedger Transportation Corp.* v. *Gallotta*, C. A. 2, 145 F. 2d 870; *In re Curtis Bay Towing Co.*, D. C. E. D. Pa., 63 F. Supp. 72.

Having once assumed jurisdiction over a limitation action, the admiralty court has power to decree relief with

respect to all parties before it. That view was clearly stated by this Court in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207. There a value stipulation had been posted by an indemnity company in respect to a limitation petition, and, after the court proceedings and full hearing of the issue of entitlement of the petitioner to limit liability, the petition was denied. This Court held that despite the denial of the petition the court below had acquired jurisdiction by virtue of the filing of the petition and consequently was empowered to decree full relief:

> "It is quite evident from these cases that this court has by its rule and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. * * * The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many-cornered controversy." 273 U. S. at 215-216.

To the same effect is the determination of the Court of Appeals for the Second Circuit in *The Adah*, 258 F. 377, which held that those parties to a limitation proceeding who should appear voluntarily or otherwise and join issues with the petitioners would be bound by the decree.

The Court of Appeals in its reversal of the District Court on this point relied in part on that decision of the Second Circuit. There the owner of a harbor deck scow chartered it to one Jacobus to be used to lighter ore from alongside a steamer. The ore was owned by Beer, with whom Jacobus contracted to transport the ore from the vessel to its destination. Beer engaged the stevedoring

concern of Brady to perform the unloading. As the loaded scow was being moved from the steamer, she overturned, the cargo was lost and both the scow and the steamer were damaged. The steamship owner sued Brady on the theory that damage to the steamer resulted from negligent loading of the scow. Jacobus, Beer, and the scow owner were impleaded under the then Admiralty Rule 59. At that point, the scow owner commenced a limitation proceeding, in which all other parties filed claim. The answers of these claimants alleged an unseaworthy condition of the scow. Cargo-owner Beer by answer alleged liability on the part of Jacobus, who, in turn, with the vessel owner, alleged that the fault of stevedore Brady had caused the damage. The District Court decree exonerated the owner of the scow, held that the stevedore's negligent unloading was the sole cause of the accident, and that Beer, having employed the stevedore, was primarily responsible to the vessel. No recovery was allowed the scow owner except for the costs of the litigation. The Second Circuit concluded that the loading condition of the Adah was so unstable as to permit her to capsize, and that Beer was properly held responsible to the steamer for negligence in removal of the cargo. As to the argument that the District Court committed error in not only absolving the Adah from blame, but in going further in fixing blame upon Brady and Beer "for the loss and injury in respect of which the Adah filed this petition," the Court said:

> "Whether it was necessary, in absolving the Adah, to fix blame on some one else, is a question we need not decide. Nor are we concerned with the inquiry whether the court could have compelled some of the parties to this appeal to come into the limitation proceedings. It is enough that they did come in, and made parties of themselves. Some of them (perhaps) came in voluntarily, but (as hereinbefore shown) all deliberately raised issues with each other,

as well as with the petitioner, Fox, and litigated those issues at great length.

"Having become parties, they are bound by the decree entered in the suit wherein they are parties.

" 'Parties in the larger legal sense are all persons having a right to control the proceeding, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies.' (Citing Greenleaf on Evidence)

"All the persons, firms, and corporations before this court in this matter fully respond to this definition. How or why they became parties is immaterial; they have had their day in court, and their relative rights have in substance been properly adjudicated."

This determination points clearly to the conclusion that, in a limitation action, the District Court has jurisdiction to determine, not only the rights that exist between the limitation petitioner and the several claimants but also the rights as among the claimants.

The case of *The Steel Inventor*, reported in the District Court at 1925 A. M. C. 226, and in the Court of Appeals for the Second Circuit, 24 F. 2d 657 and 43 F. 2d 958, as reviewed at length in the brief submitted by the United States, stands for affirmance by the Court of Appeals for the Second Circuit of the principle established in *The Adah*. See also *The Clio-The Springhill*, 1948 A. M. C. 757.

Moore-McCormack Lines v. *McMahon*, 235 F. 2d 142, involved a situation wherein a limitation petitioner filed cross-libels against certain limitation-fund claimants, and the District Court sustained exceptions to those cross-libels on the ground, in part, that they were not properly filed in the limitation proceedings. As to this, in reversing the decree of the lower court, the Court of Appeals for the Second Circuit said, at p. 143:

"We think the court was in error in its view of admiralty procedure. While the admiralty rules do not specifically regulate the practice as to cross-libels,

Admiralty Rule 50, 28 U. S. C., providing for security for costs for a cross-libel 'filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed,' has been taken as authorizing such libels arising out of the same contract or cause of action as that sued upon. The required or suggested condition is clearly fulfilled here. In fact all the various claims to be considered arise out of the one accident and loss as a single cause; and the testimony must be either identical or greatly overlapping, so much so that economy of trial litigation suggests the desirability of one trial only.' And we think our previous holding, In re United States Steel Products Co., 2 Cir., 24 F. 2d 657, 659 and The Steel Inventor, 2 Cir., 43 F. 2d 958, 961, certiorari denied, Bell v. United States Steel Products Co., 283 U. S. 819, 51 S. Ct. 344, 75 L. Ed. 1435, are direct authority for this course. The court below distinguished the cross-libels there against cargo claims in limitation of liability proceedings as being against the *res*, while the present claims were said to arise out of the relationship of the parties. But we see no basis in reason or the authorities for such a distinction; and none was drawn in the recent persuasive decision of Judge Dobie for his court in British Transport Commission v. United States, 4 Cir., 230 F. 2d 139, 143-145, upholding cross-claims in limitation procee lings. Judge Clancy said that we 'know of no authority that permits such an alleged cross-libel.' As stated, we think there is authority; but in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids."

This Court in 1872 published Admiralty Rules 54, 55, 56 and 57, which were amended in 1920 to become Rules 51, 52, 53, 54 and 55, and which today are the same.

These statutes have been liberally construed by this Court to carry out the broad principle declared by Chief

Justice Taft in *Hartford Accident and Indemnity Company* v. *Southern Pacific Railroad Company*, 273 U. S. 207, of disposing all sides of a multi-cornered dispute in an equitable manner.

Limitation or exoneration is merely a statutory defense raised by the shipowner which may permit him partial or complete relief from all of his debts. In the same way the bankruptcy court grants relief to the debtor by marshaling all of his assets, paying off his debts to the limit of his assets, and, within certain limits, relieving him of any further claims on past indebtedness.

Each claim in the limitation proceedings is brought as a libel would be brought. Each claimant has the same standing as any libelant, and is therefore subject to the same responsibilities as any other libelant who sues jointly or whose suit is consolidated with another because arising from the same state of facts.

A petition for limitation may be sought either before or after libels have been filed against the vessel owner. In the instant case a petition for limitation was filed before any libels were filed. If, on the other hand, the British Transport Commission or any other claimant had filed a libel in the district where the vessel was found, which could readily have been done, the present confusion over the question of cross-claims would not have occurred. It appears clear that the learned district judge, as well as the Court of Appeals for the Fifth Circuit on whom he relied, see *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894, (1949), failed to make this distinction. The petition for limitation does not change the form of the action, which is fundamentally a consolidated suit by various libelants against one respondent. The petition merely sets forth the relief prayed for—limitation of liability. Exoneration, as in any answer, is also sought. Under Admiralty Rule 56 the many-cornered controversy is easily settled in one proceeding.

The liberal joinder of actions by the same parties is approved in *Benedict on Admiralty*, Sixth Edition, Volume 2, at pp. 39-40:

> "While the Supreme Court has left open the general question whether joinder of proceedings is proper, *The Corsair*, (1891), 145 U. S. 335, the lower courts have been liberal in sustaining libels which join causes *in rem* and *in personam*, (citation omitted) as indeed would seem only proper in view of the fact that in any instances the broadest concourse of parties can be compelled by a petition for limitation of liability, embracing causes of action both *in rem* and *in personam*, and in view of the further fact that impleader of third parties is freely encouraged under the 56th Rule."

The same reasoning should permit all co-libelants or any other person who may be liable for the occurrence in question to be brought in to avoid multiple and costly litigation.

In *Petition of Texas Co.*, 81 F. Supp. 758, Judge Leibell declined to grant process *in rem* and *in personam* to the petitioner against the opposing claimant at that time but stated that petitioner was entitled to an answer to the petition for limitation and that if the vessels were found equally at fault the claimant would be entitled to only half damages and petitioner could settle, by way of contribution, one-half of the amount paid to the other claimants. The practical result obviously is the same as if Rule 56 had been followed. In the instant case it is inequitable for the DUKE OF YORK, found solely at fault, to withdraw from the proceedings and avoid liability in this jurisdiction.

This equitable principle has been fully recognized by this Court in the case of *Alexander* v. *Hillman*, 296 U. S. 222. That case arose by an equity suit brought by receivers of a certain company in West Virginia for the purpose of winding up the affairs of the company and the disposition of its assets. Certain officers of the corporation who were not

served with process appeared as respondents and presented their claims. The receiver of the company then filed various counter-claims against the officer-respondents and prayed for affirmative relief against them. This affirmative relief was allowed by the Court, which said at page 239:

> "The ancillary bill is not an original bill for the commencement of a suit. That it was not so intended is shown by the fact that process was not prayed or issued. While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve as a pleading in the main suit, to put respondents to proof of their claims and to assert the right to affirmative relief. Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all the parties before them.
>
> * * *
>
> "Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. (Citing Cases) * * *"

These same principles should apply in an admiralty court in a limitation-of-liability proceeding. As we have stated, the admiralty court in such a proceeding is exercising equitable jurisdiction and has authority to settle all the matters

and things in controversy concerning the parties which are before it.

In the instant case all of the claimants, including British Transport Commission, have filed their claims and submitted themselves to the jurisdiction of the court to determine all of the issues between them.

This jurisdiction carries with it the power of the court to grant affirmative relief on a cross-claim against a claimant, who in this case is British Transport Commission. Any other interpretation would be most inequitable. Here we have many claimants from many parts of the world, who have filed their claims in the limitation proceedings instituted by the United States of America. All of the evidence concerning the collision involved herein has been presented both by petitioner and the claimant, British Transport Commission.

The merits of the case have been adjudicated.

It would work an undue hardship on all of the claimants herein not to have their rights against the British Transport Commission settled at this time. To hold otherwise would mean that the various claimants would have to pursue their causes of action against the British Transport Commission in another forum at great expense and at a time when perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time.

As a practical matter as well as an equitable one, these claimants should be allowed to implead the British Transport Commission. The Second Circuit in *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corporation, et al.*, C. C. A. 2, 86 F. 2d 708, has stated that a determination in a limitation-of-liability proceeding will be *res adjudicata*. This position is also supported by *The Adah*, above, wherein the Court stated that all parties to a proceeding for limitation of liability who appear voluntarily or

otherwise and join issues with the petitioners and between themselves are bound by the decree. If the issue of liability in the instant case is *res adjudicata* and all the parties herein bound thereby, then the District Court should also be empowered to decide the issues of damages as between all the parties before it. This can be accomplished only by the allowance of an impleading petition under the 56th Admiralty Rule.

CONCLUSION

The intervening claimants respectfully submit that the Court of Appeals was correct in its conclusion that these claimants in the limitation proceeding may rightfully file impleading petitions against their co-claimant the British Transport Commission, whereby the District Court may be empowered to decree affirmatively in their favor.

Respectfully submitted,

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